TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 279

CANADIAN AVIATOR LIMITED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Brief for Appellant

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

RELEVANT DOCKET ENTRIES

1942

August 4. Libel filed.
August 17. Exceptions filed.
October 19. Exceptions argued.

1943

April 16. Opinion, Smith, J., sustaining exceptions, filed.
June 22. Decree dismissing libel filed.
June 25. Libellant's notice of appeal filed.
June 25. Libellant's petition for appeal filed.
June 25. Order of court allowing appeal filed.
June 25. Assignments of error filed.
July 19. Transcript of record transmitted to U. S. Circuit Court of Appeals.

IN UNITED STATES DISTRICT COURT

LIBEL—Filed August 4, 1942

To the Honorable the Judge of the United States District Court of the District of New Jersey:

The libel and complaint of Canadian Aviator, Limited, owner of steamship *Cavelier*, against the United States of America in a cause of damage, civil and maritime, alleges as follows:

First. At all the times hereinafter mentioned libellant was and now is a corporation duly organized and existing under and by virtue of the laws of the Dominion of Canada [fol. 2] with its principal place of business in Montreal, Canada, and owner of steamship *Cavelier*, which was up to the time of the events hereinafter set forth tight, staunch, strong and in all respects seaworthy.

Second. At all the times hereinafter mentioned the respondent was and now is a corporation sovereign and owner of the patrol boat *YP 249* which was and now is a public vessel in the service of the United States Navy. Upon information and belief the *YP 249* is now within this district and within the jurisdiction of this Honorable Court.

Third. On July 7, 1942 the *Cavelier*, laden with cargo, was bound on a voyage from a Canadian port to a Jamaican port. Her route was fixed by orders from the United States Naval authorities, and upon orders from United States Naval authorities the *Cavelier* approached the entrance to Delaware Bay for the purpose, in obedience to such orders, of entering Delaware Bay. When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* and attempted as ordered to enter Delaware Bay following directly astern of the *YP 249* but about 9:30 p. m., while proceeding directly astern of the *YP 249* as ordered, the *Cavelier* struck a submerged wreck and sustained serious damage.

[fol. 3] Fourth. The aforesaid striking of the submerged wreck by the *Cavelier* and the damages resulting therefrom were not caused or contributed to by any fault or neglect on the part of the *Cavelier* or those in charge of her, the libellant herein, or anyone for whom the libellant may be responsible, but were due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.

2. She failed to keep a good look-out.

3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.

4. She led the *Cavelier* directly over a submerged wreck.

5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay.

Fifth. By reason of the premises libellant has sustained damages, including repairs to the *Cavelier*, loss of earnings during repairs, and incidental expenses in the sum of about $75,000 as nearly as can now be ascertained, no part of which has been paid although duly demanded.

Sixth. Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*.

Seventh. In circumstances similar to those hereinbefore set forth the Government of the Dominion of Canada allows nationals of the United States to sue in its Courts.

[fol. 4] Eighth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that respondent be required to plead to this libel within the time limited by the rules of this Honorable Court and that if the respondent fails to plead within the time so limited that libellant may enter an interlocutory decree without notice; and that this case be heard and determined according to the principles of law and rules of practice obtaining in like causes between private parties; and that the Court will make a decree in favor of libellant against respondent for the amount of libellant's damages as aforesaid with interest and costs, and that libellant may have such other and further relief in the premises as may be just.

Harry C. Brown, Burlingham, Veeder, Clark & Hupper, Proctors for Libellant, 24 Commerce Street, Newark, New Jersey.

(Verification.)

[fol. 5] In United States District Court

Exceptions—Filed August 17, 1942

The United States of America, appearing specially herein for the purpose of filing these exceptions and for no other purpose, respectfully excepts to the libel herein on the following grounds:

First: The libel fails to state a cause of action for which the United States has consented to be sued.

Second: The libel fails to state a cause of action within the provisions of the Public Vessels Act, 1925, or the Suits in Admiralty Act, 1920.

Wherefore, respondent prays that the libel herein be dismissed with costs.

Charles M. Phillips, United States Attorney, Proctor for Respondent.

Dated: August 17, 1942.

IN UNITED STATES DISTRICT COURT

OPINION—Filed April 16, 1943

SMITH, D. J.:

This is a suit in admiralty under the Public Vessels Act of 1925, 46 U. S. C. A. 781-790, and is before the Court at this time on exceptions to the libel filed by the respondent. It is urged in support of the exceptions that the libel fails to state a cause of action cognizable under the said Act. The determination of the question presented, which [fol. 6] appears to be one of novel impression, requires a construction of the pertinent provision of the Act, 46 U. S. C. A. 781, which reads as follows: "A libel in personam in admiralty may be brought against the United States, * * * for damages *caused by a public vessel of the United States*, * * *."

It is well established that the United States may not be sued without its consent, and where, as here, the sovereign immunity is waived by statute, the statute must be strictly construed. The waiver of immunity may not be extended by implication beyond the clear import of the language of the statute. *United States* v. *Michel*, 282 U. S. 656; *Eastern Transportation Co.* v. *United States*, 272 U. S. 675; *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Clyde Mallory Lines*, 127 F. 2d 569; *United States* v. *Petroleum Nav. Co.*, 109 F. 2d 699. The cause in which the statute is invoked must be clearly within its provisions. Ibid.

The facts upon which the present cause of action is founded are recited in the third paragraph of the libel. The specific acts of negligence of which the libellant complains, which are stated in the fourth paragraph of the libel, al-

though charged against the vessel and "those in charge of her", are chargeable against only "those in charge of her." It seems reasonably clear from the allegations of the libel that the accident was caused not by *the negligent operation of the vessel* but by the *personal and independent negligence of its officers*. The vessel was not the proximate cause of the accident; it was not the efficient cause.

The facts of the instant case are comparable to, although not identical with, the facts in the case of *The Sarnia*, 261 Fed. 900, in which Judge Hough said: "The tug Palmer (here the YP-249) committed no fault, and when Barrett [fol. 7] furnished The Sarnia with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on The Sarnia's bridge and navigating that steamer with her own steam." In the instant case the officers of the YP-249 rendered nothing more than a "pilotage" service, and whether they stood on the bridge of the Cavelier or on the bridge of their own vessel is immaterial.

It is the opinion of the Court that the right under the Act to maintain a suit against the United States arises only where the public vessel is the proximate cause of the damage. The interpretation urged by the libellant would impose on the United States a liability for the negligence of its employees and officers, a liability which it has not assumed.

The exceptions to the libel are sustained and the libel is dismissed. This opinion shall be impounded with the other records in this case.

[fol. 8] IN UNITED STATES DISTRICT COURT

DECREE—June 22, 1943

Respondent herein having filed exceptions to the libel and said exceptions having duly come on for argument on October 19, 1942, before Honorable William F. Smith, District Judge, and the Court after hearing Harold B. Finn, Esq., of counsel for respondent, in support of said exceptions, and Eugene Underwood, Esq., of counsel for libellant, in opposition thereto, and after due deliberation, having filed its opinion on April 16, 1943, sustaining the exceptions to the libel and dismissing the libel;

Now, upon the libel herein and the exceptions thereto filed by the respondent, and on motion of Charles M. Phillips, United States Attorney, Proctor for respondent, it is

Ordered that the exceptions filed by respondent to the libel herein be, and the same hereby are, sustained; and it is further

Ordered, Adjudged and Decreed that the libel herein be, and the same hereby is, dismissed.

Dated: Newark, N. J., June 22, 1943.

(Signed) William F. Smith, U. S. D. J.

[fol. 9] In the United States Circuit Court of Appeals for the Third Circuit

Canadian Aviator Limited, Appellant,

vs.

United States of America

Minute Entry of Argument

And afterwards, to wit, the 18th day of November, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 2d day of May, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 10] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8429

CANADIAN AVIATOR LIMITED, Appellant,

v.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the District of New Jersey

Before Biggs, Maris and Jones, Circuit Judges

OPINION OF THE COURT—Filed May 2, 1944

By MARIS, Circuit Judge:

Canadian Aviator Limited, the owner of the steamship Cavelier, filed a libel in the District Court for the District of New Jersey seeking to recover $75,000 from the United States under the Public Vessels Act (46 U. S. C. A. § 781) for damages alleged to have been sustained by the Cavalier. The respondent prayed that the libel be dismissed upon the grounds that it failed to state a cause of action within the provisions of the Public Vessels Act for which the United States has consented to be sued. The district court dismissed the libel for want of jurisdiction.

[fol. 11] The district courts, of course, have no jurisdiction of a suit against the United States unless the United States has consented to be sued. United States v. Sherwood, 312 U. S. 584, 586 (1941). The libellant contends, however, that consent to the present suit has been given by Congress in the Public Vessels Act. Section 1 of that act (46 U. S. C. A. § 781) provides:

> "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

This statute, the libellant urges, is applicable to the facts of the present case.

The libel in the case before us avers that the United States was the owner of the patrol boat YP 249, a public vessel in the service of the United States Navy; that the Cavelier while en route from Canada to Jamaica received orders from the United States naval authorities to enter the Delaware Bay; that upon approaching the bay she received instructions from the naval authorities that the YP 249 would precede her through the waters of the entrance to Delaware Bay and received orders from such authorities to follow directly astern of the YP 249; and that pursuant to these orders "the Cavelier proceeded directly astern of the YP 249 and attempted as ordered to enter Delaware Bay following directly astern of the YP 249 but about 9.30 p. m., while proceeding directly astern of YP 249 as ordered, the Cavelier struck a submerged wreck and sustained serious damages." It is thus averred, says the libellant, that the damages were caused by a public vessel owned by the United States, a cause of action for which the United States has waived its sovereign immunity and for which it has consented to be sued in personam in admiralty.

[fol. 12] The question which we must determine, therefore, is whether the damage to the Cavelier can be said, upon the libellant's averments, to have been "caused by a public vessel," the YP 249, within the meaning of the Public Vessels Act. In determining this question we must bear in mind that the act, being the relinquishment of a sovereign immunity, must be strictly interpreted. United States v. Sherwood, 312 U. S. 584, 590 (1941); Schillinger v. United States, 155 U. S. 163, 166 (1894).

Since the phrase "caused by a public vessel" is not further defined in the act, it is appropriate to seek the legislative intent in its usage. State of Maine v. United States, 134 F. 2d 574 (C. C. A. 1, 1943). The Committee on Claims of the House of Representatives had this to say in its report [1] as to the purpose of the bill (H. R. 9535) which became the Public Vessels Act:

> "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the

[1] House Report No. 913, 68th Cong., 1st Sess.

result of a collision with any Government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act."

"Shipowners, whose vessels have suffered a collision with any Government-owned ship in the public service and who have a cause of action under existing procedure, must apply to Congress for the passage of a special enabling act before suit can be brought in the admiralty courts."

In a portion of the report devoted to the legislative history of governmental immunity the Committee on Claims stated:

"The only general legislation covering the subject matter of the pending bill is the provision embodied in the act of December 28, 1922, authorizing the Secretary of the Navy to adjust claims involving not more than $3,000. This latter is, of course, wholly inadequate, since the damages in collision cases are usually very large in amount."

[fol. 13] In dealing with the law in other countries as to the right to sue the sovereign in cases such as that sought to be covered by the proposed bill the report stated:

"Wholly apart from the petition of right, a simple and efficacious method of relief is available in England for the very claims now under consideration. In the case of a collision between a British public vessel and the ship of a subject or a foreigner, it is the established English practice to permit the private owner to begin suit in the English courts against the navigating officer of the Government vessel. As a matter of course, the solicitor for the treasury appears on behalf of the respondent. The case is tried as if between private parties, with similar rights of appeal to either litigant. If it is shown that the public vessel, through her navigators, was at fault, the Government, after judicial assessment of the damages, pays the loss sustained by the private owner."

Attached to the report and made a part of it are letters from Secretary of State Charles E. Hughes, Acting Secre-

tary of the Navy Theodore Roosevelt, Jr., Secretary of the Treasury Andrew W. Mellon, Secretary of War John W. Weeks, Attorney General Harlan F. Stone and Secretary of Commerce Herbert Hoover written to the Committee on Claims in response to a request as to their views upon a proposed bill (H. R. 6989, 68th Cong., 1st Sess.) authorizing suits against the United States in admiralty for collisions caused by public vessels belonging to the United States. H. R. 6989 was an earlier bill which was supplanted by H. R. 9535. Each writer expressed himself as being in favor of an act authorizing suits against the United States in cases of collisions with public vessels of the United States. Except for claims for towage and salvage services for which the bill also provided, the discussion of the cabinet officers dealt solely with collision claims. We do not find the faintest suggestion either in the correspondence or in the report itself that the bill would effect a general waiver of the sovereign immunity from suit on all claims for damages resulting [fol. 14] from the negligence of the personnel of a public vessel even though the vessel itself was not the physical instrument which did the injury. The House Committee report, with its accompanying correspondence, was adopted in toto by the Committee on Claims of the Senate as its report.[2]

The libellant points out that, whereas the earlier bill (H. R. 6989) was limited in terms to suits for *collisions* caused by public vessels, the bill finally enacted (H. R. 9535) authorized suits for *damages* caused by such vessels. It argues that the change in phraseology indicates a Congressional intent to cover a field of damage claims broader than those arising solely from collisions. We think that this change in the phraseology of the bill was intended to extend the waiver of immunity beyond cases of actual collision to those cases in which the vessel is the physical cause of the injury even though it does not come into actual physical contact with the injured object.[3] We are satisfied,

[2] Senate Report No. 941, 68th Cong., 2d Sess.

[3] Thus in Coastwise Transp. Corporation v. The United States, 43 F. 2d 401 (D. C. Me. 1930), recovery was permitted for damages to a vessel pushed or pulled onto a reef by the navy tug which had her is tow. In The Harding Highway, 53 F. 2d 938 (C. C. A. 3, 1931), recovery was

however, that Congress did not intend by the act to extend the waiver of immunity beyond those cases in which the vessel itself was the physical instrument by which the damage was done. The fact that the Congressional committees appended the correspondence regarding H. R. 6989 to their reports on H. R. 9535 is strong evidence that they did not consider that the latter bill was substantially broader than the former one. Certainly if Congress had contemplated that H. R. 9535 would permit suit against the United States for all damages resulting from the negligence of naval personnel aboard public vessels it would not have used [fol. 15] this correspondence as it did, but would have submitted the new bill to the department heads for their views upon the desirability of such a radical departure from historic sovereign immunity.

In using the phrase "damages caused by a public vessel" Congress was not using language unfamiliar to the law. In the case of The Vera Cruz (No. 2), 9 L. R. Prob. Div. 96 (1884), the English Court of Appeal was called upon to construe the meaning of the phrase "damage done by any ship" in the English Admiralty Court Act of 1861. In that case the Master of the Rolls said (p. 99):

> "In 1861 came the Act with the words 'any claim for damage done by any ship,' and in 1862 there was the case of The Malvina (Lush. 493), wherein Dr. Lushington stated that the 7th section of the Act of 1861 was passed for the purpose merely of including damage done *by* a ship. With that view I agree. The section indeed seems to me to intend by the words 'jurisdiction over any claim,' to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage

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allowed against the United States upon proof that the United States dredge W. L. Marshal in attempting to pass the ferryboat Harding Highway occupied more than her share of the channel and crowded the ferryboat so that it struck a stone jetty and sustained damage. In McCormack Sand & Gravel Corporation v. United States, 1938 A. M. C. 1569 (D. C. N. Y. 1938), recovery was permitted for damages to scows which resulted from swells negligently set up by a United States destroyer.

being physically caused by the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case when physical injury is not done by a ship."

In the same case Judge Bowen said (pp. 100, 101):

"Shortly, the question is, whether this is a claim for damage done by a ship, and I think that the history of the law on this point proves that it is not. Apart from that, however, the obvious meaning of the Act leads to the same conclusion—for the Act gives a claim for compensation for damage done by the ship—this, and this only, is the cause of action. 'Done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument."

In the case of The Osceola, 189 U. S. 158 (1903), the Supreme Court had under consideration the meaning of a [fol. 16] Wisconsin statute which provided that every ship, boat or vessel navigating the waters of that state should be liable "for all damages arising from injuries done to persons or property by such ship, boat or vessel." The suit was by a seaman who had been injured by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel. The court said (pp. 176, 177):

"But the vital question in the case is whether the damages arose from an injury done to persons or property *by such ship*, boat, or vessel. The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases *where the damage is done by the ship herself, as the offending thing* [emphasis supplied], to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. . . .

"The act in this particular uses the same language as the seventh section of the English Admiralty Court Act of 1861, which declares that 'the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.' Construing that act, it has been held by the Court of Admiralty that it applies to

damages occasioned by a vessel coming in collision with a pier, The Uhla, L. R. 2 Ad. & Ec. 29, note, and also to cases of personal injury, The Sylph, L. R. 2 Ad. & Ec. 24, where a diver, while engaged in diving in the river Mersey, was caught by the paddle wheel of a steamer and suffered considerable injury; but not to a case where personal injuries were sustained by a seaman falling down into the hold of a vessel, owing to the hatchway being insufficiently protected, The Theta, 1894, P. D. 280, or to loss of life, The Vera Cruz, 9 P. D. 96. As we have indicated above the statute was confined to cases of damage done by those in charge of a ship *with the ship as the 'noxious instrument'* [emphasis supplied], and that cases of damages done on board the ship were not within the meaning of the act of damages done *by the ship.*"

We think that Congress in enacting the Public Vessels Act likewise had in mind the concept that the phrase [fol. 17] "caused by a public vessel" meant caused by those in charge of the vessel, with the vessel as the 'noxious instrument' by which the injury is physically done. Our conclusion in this regard is supported by two decisions of the Circuit Court of Appeals for the Second Circuit. O'Neal v. United States, 14 F. 2d 869 (D. C. E. D. N. Y., 1925), affirmed 11 F. 2d 871 (C. C. A. 2, 1926); Dobson v. United States, 27 F. 2d 807 (C. C. A. 2, 1928).

The libellant strongly urges that this is too narrow a construction to be placed upon the statute, that under the ancient rule in the admiralty a vessel is personalized and must answer as a jural personality for the negligence of her officers and crew, and that it was in this personalized sense that Congress referred to the vessel as causing damage. While it is true that a ship is ordinarily thus personalized in the admiralty it does not follow that Congress intended by the Public Vessels Act to endow the public vessels of the United States with such a personality.

The fiction of the ship as a jural personality arose in the admiralty as an expression of the principle that one who has a contract, to which the ship is bound and which is breached, or who, through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship. 1 Benedict on Admiralty, 6th Ed.

11. The interest thus given is known as the maritime lien and by its enforcement the ship answers for its liabilities whether in contract or tort. Thus the personalization of a ship has no significance in the absence of an enforceable maritime lien. It is only in the enforcement of such a lien by a proceeding in rem against the vessel that this legal fiction may be invoked.

The Public Vessels Act, however, in Section 8 (46 U. S. C. A. § 788) expressly provides that nothing in the act "shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States." Section 1 of the act, as we have seen, authorizes [fol. 18] the filing of a libel *in personam* against the United States. The act does not authorize a proceeding *in rem* against a public vessel and any possibility of such a proceeding is negatived by the express denial of a maritime lien. It follows that the legal fiction by which the ship is held to answer for the torts of her officers and crew has no place in a proceeding against the United States under the act.

It seems unlikely that Congress would intentionally burden the national defense by making the public treasury answerable in damages for injuries caused by members of the naval forces in the performance of their duties, even though the duties be negligently performed. But if it did decide to give up its sovereign immunity to this unprecedented extent we think that it would do so directly in clear and unequivocal language and would not seek to achieve the result in any such obscure and circuitous way as is involved in the statutory construction urged upon us by the libellant. We cannot think that in authorizing an action *in personam* against the United States for damages caused by a public vessel Congress intended to refer to "public vessel" in the sense of a fictional personality responsible for damages caused by her officers and crew, and thus by implication to impose upon the United States liability for such damages as if caused by the personalized vessel, merely because in a wholly different kind of proceeding,—an action in rem against a private vessel to enforce the lien for a martime tort,—the admiralty has for perfectly valid reasons not here present thus personalized the vessel.

Turning to the averments of the libel it is clear that the YP 249 was not the "noxious instrument" which physically caused the injury to the Cavelier. The physical cause

was the submerged wreck. Libellant's complaint in reality is of the negligence of the navigating officers of the YP 249, whose directions the Cavelier was following. Its grievance would have been no different if those officers had directed the course of the Cavelier from her own bridge instead of from the bridge of the YP 249. The latter vessel, as a [fol. 19] physical instrumentality, had no part in the matter. The United States, however, has not consented to be sued generally for damage resulting from the negligence of its naval personnel but only when by reason of such negligence a public vessel causes the damage. It follows that the district court was right in dismissing the libel for want of jurisdiction.

The decree of the district court is affirmed.

DISSENTING OPINION

Biggs, Circuit Judge, dissenting.

The majority opinion lays too great an emphasis upon the necessity of physical contact, such as that which ordinarily occurs in a collision, between the offending vessel and the injured vessel. This is demonstrated by the fact that the majority conceive of those decisions in which it has been held that a ship is entitled to damages for injuries sustained because she has run upon a jetty to avoid collision with another vessel or injuries have resulted to her because of swells caused by an offending vessel as an extension of waiver of immunity by the United States. See The Harding Highway, 53 F. (2nd) 938; Coastwise Transp. Corp. v. The United States, 43 F. (2nd) 401. It is also shown by the fact that the majority rely to a considerable extent upon the decisions in such cases as The Osceola, 189 U. S. 158, and The Vera Cruz (No. 2) 9 L. R. Prob. Div. 96 (1884). The resulting narrow construction placed upon the statute *sub judice* effects an injustice in the case at bar.

The Suits in Admiralty, Merchant Vessels, Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U. S. C. A. § 741-752, and the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112, 46 U. S. C. A. §§781-790, must be construed in *Pari Materia*. State of Maine v. United States, 45 F. Supp. 35, aff'd 134 F. (2nd) 574; Coastwise Transp. Corporation v. United States, 43 F. (2nd) 401.[1] I think that it was the intention

[1] Mr. Chief Justice Stone, then Attorney General, in a letter dated April 8, 1924, stated to the Chairman of the

[fol. 29] of Congress in passing the Acts to put the United States on the same basis (libels *in rem* aside) as the private shipowner. While the suits authorized by the Acts must be brought against the United States by libels *in personam*, Congress intended to embrace within the scope of the Acts the kind of suits which could have been maintained by a libel *in rem* against a privately owned vessel as well as the kind of suits which could have been maintained by a libel *in personam* against the private owner of a ship because of the acts of his officers or crew. Section 2 of the Merchant Vessels Act provides this specifically and both Acts require substantially similar construction. See Benedict on Admiralty, Knauth's Sixth Edition, Vol. 1, Section 193. It should be noted that Section 3 of the Merchant Vessels Act provides that "* * * suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." This admonition relates not only to procedure, but provides also the substantive remedies which would be available in admiralty against a private party. Section 2 of the Public Vessels Act provides that suits brought under it "shall be subject to and proceed in accordance with the provisions of * * * [28 United States Code 741-752, The Suits in Admiralty Act] * * *, in so far as the same are not inconsistent * * *". It would seem that these words bring the provisions of the Merchant Vessels Act into the Public Vessels Act. They are not merely of procedural effect but give the libellant the same rights under the Public Vessels Act (libel *in rem* aside) which he would have against a private person or a vessel privately owned. While the Acts prevent the private person from securing a maritime lien, it does not follow as the majority assert that "* * * the legal fic-

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Committee on Claims, House of Representatives, in respect to the original bill, H. R. 6989 (hereinafter discussed in this opinion), "The proposed bill intends to give the same relief against the Government for damages caused by collision by its public vessels * * * as is now given against the United States in the operation of its merchant vessels, as provided by the suits in admiralty act of March 9, 1920."

tion by which the ship is held to answer for the torts of [fol. 21] her officers and crew has no place in a proceeding against the United States under the [Public Vessels] act."

The libellant in the case at bar is entitled to maintain its cause of action against the United States under the Public Vessels Act for it alleges negligence on the part of the officers of the patrol boat YP249 in operating the vessel, and, personifying the patrol boat in accordance with the usual admiralty fiction, negligence on the part of the patrol boat herself. The majority seem to conclude that in order to maintain a suit under the Public Vessels Act the offending United States vessel, as a "noxious instrument", must have come into direct physical contact with the injured ship, must have set physical forces in motion (such as swells) which came into physical contact with another vessel, injuring her, or the injured vessel must have been damaged in an attempt to avoid direct physical contact with the offending ship. I think these views are not assisted by the authority of The Osceola and The Vera Cruz (No. 2) supra. The provisions of Section 1 of the Public Vessels Act are broader than those of the Wisconsin statute, R. S. 1898, Section 3348, which was before the Supreme Court in The Osceola, as they are likewise broader than those of the English Admiralty Court Act of 1861 which was *sub judice* in The Vera Cruz. The English Admiralty Court Act used the words "damage done by any ship", a phrase narrower in scope than that of the Public Vessels Act which gives a cause of action for "damages caused by a public vessel of the United States". The Wisconsin statute *sub judice* in The Osceola used substantially similar language. Moreover, in The Osceola the court was passing upon the right of a seaman to recover damages for injuries sustained while he was upon his own vessel and in The Vera Cruz the administratrix of the master of the ship Agnes sought to recover damages for his death when his ship was run down by The Vera Cruz. The *ratio decidendi* of The Osceola lies in the statement by Mr. Justice Brown, 189 U. S. at pp. 176-177, that "The statute was doubtless primarily intended to cover cases of collision with other vessels or [fol. 22] with structures affixed to the land, and to other cases where the damage is done with the ship herself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. To hold that it

applies to injuries suffered by a member of the crew on board the ship is to give the act an effect beyond the ordinary meaning of the words used * * * In the case under consideration the damage was not done by the ship in the ordinary sense of the word, but by a gangway, which may be assumed to be an ordinary appliance of the ship, being blown against the libellant by the force of the wind." In The Vera Cruz the judges of the Court of Appeal adhered very strictly to the language of the Admiralty Court Act, the Master of the Rolls in his opinion emphasizing the words "done *by* a ship". In view of the fact that the master of the Agnes lost his life because he was thrown into the killing element, the water, by the impact of the Vera Cruz upon the Agnes, the decision must rest upon the precise terms of the statute.

The legislative history of the Public Vessels Act in my opinion does not support the majority view. The original bill, H. R. 6989, dealt specifically with "collisions". Naturally the correspondence from executive officers of the government and others used the words "collision" or "collisions" in discussing the proposed measure. Referred to the Committee on Claims of the United States Senate, H. R. 6989 died. H. R. 9535 was then introduced, containing the broad language of the Act *sub judice*. Senator Bayard stated that this bill was designed to take care of "all" claims "caused by reason of the shortcomings of a United States ship." See Note 2, infra.

The Public Vessels Act like the Merchant Vessels Act was designed to lift from the shoulders of Congress the many and harrassing claims arising out of the negligent operation of ships owned or operated by the United States and to substitute therefor actions in the District Courts of [fol. 23] the United States subject to the conditions stated.[2]

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[2] Senator Bayard stated:

"Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damage from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

Negligent operation of United States vessels may cause damage to ships in other ways than those indicated by the majority as being within the purview of the Act. Recovery by the injured ship was not limited by Congress to such a narrow scope.

The decision of the majority does not overrule the decision of this court in The Harding Highway, supra, but their conclusions avoid the ruling of that authority. In the cited case the United States was held liable because a government dredge operated by the Engineer Corps of the United States Army crowded The Harding Highway, a ferry, into a stone jetty at the mouth of the Christiana River. There was no direct contact, but improper handling of the dredge clearly caused the accident because it put the ferry in fear of a collision and in endeavoring to escape that danger she hit the jetty. In Coastwise Transp. Corporation v. the United States, supra, the United States was held liable because a goverament tug towed a vessel to the ground in Portsmouth Harbor. In McCormack Sand & Gravel Corporation v. United States, 1938 A. M. C. 1569 (D. C. E. D. N. Y.), the United States was held liable because the de-[fol. 24] stroyer Dahlgren by excessive speed caused the tow of the Dauntless to "pound" thus causing damage to

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"Outside of that, there are many claims which must be settled by the Department of State, because our own nationals are forbidden going into our own Courts, and the nationals of other countries cannot come in, and this bill is to remedy that situation. It would give a person aggrieved because of an accident by reason of the short-comings of a United States ship the right to go into a district court and prosecute his action." "Senator Robinson stated, 'If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.' Senator Bayard replied, 'All claims of this nature.'" Congressional Record, 68th Congress, 2nd Session, February 12, 1925, p. 3560.

In the House of Representatives Mr. Underhill, who introduced and sponsored H. R. 9535, stated:

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents." Congressional Record, 68th Congress, 2nd Session, January 19, 1925, p. 2087.

the scows. In all three of these cases recovery properly was had under the Public Vessels Act. None of them are doubtful cases. They are decisions in which the provisions of the statute were applied with due regard for the background of fact.[3]

---

[3] Compare the two decisions of the Circuit Court of Appeals for the Second Circuit, relied on by the majority. These cases, in my opinion, were also decided correctly on their facts.

In O'Neal v. United States, 11 F. (2nd) 869, aff. 11 F. (2nd) 871, suit was brought by a seaman for recovery of damages for injuries sustained by him on board his own vessel from the explosion of a shell in the hands of a gunner's mate. Judge Campbell stated that Congress by enacting the Public Vessels Act "clearly did not intend to overturn the government's established policy, and permit its employees to bring actions for damages received on government ships in the course of their employment, * * *." Judge Campbell did go on to say that Congress intended by the use of the words damages "caused by a public vessel" to effect the same meaning as the English Courts gave to the words "done by any ship", but in view of the earlier portion of his ruling the latter statement seems to me to be pure dicta. The Court of Appeals for the Second Circuit affirmed the judgment in a per curiam opinion.

In Dobson v. United States, 27 F. (2nd) 807, suits had been brought by the representatives of naval officers who lost their lives on board a United States submarine while in the performance of their duty as the result of a collision between a steamship and the submarine. Judge Campbell had dismissed the libels on the authority of O'Neal v. United States, supra. See Haselden v. United States, 24 F. (2nd) 529. In his opinion in the Circuit Court of Appeals Judge Swan stated, 27 F. (2nd) at pp. 808-809, "Nevertheless the construction contended for by * * * [the libellants] involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms." He then cited The Osceola and quoted a part of the opinion in that case which I have quoted above.

If I am correct in my conclusion that it was the intention of Congress to impose on the United States the same liability (libel *in rem* aside) as is imposed by the Admiralty law on the private shipowner, the authorities which would support a judgment in favor of the libellant are legion. See The Kronprinzessin Cecilie, 192 Fed. 27; The Compania, 203 Fed. 855; The Washington Irving, 250 Fed. 797; The Luke, 19 F. (2nd) 923, aff'd 19 F. (2nd) 925; The J. C. Hart, 43 F. (2nd) 566; The Favorita, 43 F. (2nd) 569. See also [fol. 25] The Lyndhurst, 92 Fed. 681, in which a tug at night turned her tow adrift without proper lights. Her tow came into collision with another tug. The first tug was held to be at fault *in rem* for leaving her tow without lights. This is the equivalent of saying that she was at fault *in rem* because those in charge of her failed to light the tow.

The decision of the majority is incompatible even with the narrow view of the statute which they adopt. They would allow a recovery if injury is caused to a vessel by reason of her movements in an attempt to escape collision, but not if the injury occurs because the injured ship is compelled to follow a lead vessel which leads her into an obstruction. In other words, if the complaining vessel is injured because in fear of collision she runs aground, she may recover (The Harding Highway); but if, because she is impelled by a lead vessel to run into an obstacle in a channel, she may not recover (the case at bar). The distinction seems to lie only in a difference in motivation of the injured vessel's movements and in nothing more substantial.

But apart from the foregoing the Cavelier, as has been stated, was in convoy. She had been ordered to follow directly astern of the YP 249. She obeyed these orders. Had she not done so, the Cavelier, herself, her officers and owners might have been subject to heavy penalties. The Cavelier, therefore, for all practical purposes, was as firmly fastened to the stern of the YP 249 as if she had been in tow. The accident occurred because the YP 249 led the Cavelier over the submerged wreck. True the submerged wreck caused the damage, but the instrument was the YP 249 which "pulled" the Cavelier into the dangerous obstacle. Compare these facts with those of Coastwise Transp. Corporation v. United States, supra. The majority state that the YP 249 "* * * as a physical instrumentality, had no part in the matter." This seems to me to be clearly an incorrect conclusion on the facts. The Cavelier followed the stern of the YP boat; the YP boat therefore was a physical instru-

mentality just as is the lantern which leads one down a path [fol. 26] at night. Compare the tortious use of the dredge in The Harding Highway.

The majority also express the view that the situation presented by the circumstances of the case at bar is substantially the same as if the officers of the YP 249 had directed the course of the Cavelier from her own bridge instead of from the bridge of the YP 249. I cannot agree. The Cavelier followed the YP boat as she was compelled to do. The officers of the YP boat were upon the bridge of their own vessel and not on the bridge of the Cavelier.

For the reasons given, I must respectfully dissent from the majority view.

The judgment should be reversed.

[fol. 27] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

CANADIAN AVIATOR LIMITED, Appellant,

vs.

UNITED STATES OF AMERICA

JUDGMENT—Filed May 2, 1944

Present: Biggs, Maris and Jones, Circuit Judges.

On Appeal from the District Court of the United States, For the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court, Maris, Circuit Judge.

May 2, 1944.

Biggs, Circuit Judge, dissents.

[fol. 28] UNITED STATES CIRCUIT COURT OF APPEALS, THIRD JUDICIAL CIRCUIT

Wilmington, Delaware

33

Chambers of Judge Biggs.

Copy

May 11, 1944.

Mr. William P. Rowland, Clerk, U. S. Circuit Court, Philadelphia 7, Pennsylvania.

DEAR SIR:

I am amending the dissenting opinion in No. 8429, Canadian Aviator Limited v. United States of America, as hereinafter indicated. Please send copies of this letter to counsel.

Insert after the last sentence of the first full paragraph upon page 13 the following sentence, "See note 2 *infra*." Amend note 2 on page 14 by inserting before the word "Congressional", first occurrence, the following, "Senator Robinson stated, 'If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.' Senator Bayard replied, 'All claims of this nature.' "

Please file this letter and make a note on it of the filing date.

Very truly yours, John Biggs, Jr., U. S. Circuit Judge.

Copy to Judge Maris, Judge Jones.

Endorsements: Amendment to Dissenting Opinion. Received & Filed May 12, 1944. Wm. P. Rowland, Clerk.

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 279

CANADIAN AVIATOR LIMITED,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

CANADIAN AVIATOR LIMITED,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Canadian Aviator Limited, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit filed May 2, 1944 affirming (with a dissenting opinion by Biggs, C. J.) a final decree in admiralty entered in the District Court for New Jersey on June 22, 1943 dismissing the libel for want of jurisdiction (R. 5).

Jurisdiction

Jurisdiction is based on Section 240(a) of the Judicial Code as amended, 28 U. S. Code 347.

The mandate of the Circuit Court of Appeals was entered May 2, 1944 (R. 22).

Opinions Below

The opinion of the District Court is not reported except at 1943 A. M. C. 744. It is printed at pages 4 to 5 of the record.

The opinion of the Circuit Court of Appeals is not reported except at 1944 A. M. C. 732. It is printed at pages 7 to 15 of the record. The dissenting opinion of Biggs, C. J., is printed at pages 15 to 22.

Summary Statement

The libel alleges that petitioner, a Canadian corporation, owned steamship *Cavelier* and that respondent owned Navy patrol boat *YP 249* which was a public vessel of the United States. While on a voyage from a Canadian to a Jamaican port the *Cavelier* was ordered by United States Naval authorities to enter Delaware Bay. As she approached the entrance she received instructions from United States Naval authorities that *YP 249* would guide her through the entrance and to follow directly astern of *YP 249*. While following directly astern of *YP 249* the *Cavelier* struck a submerged wreck and sustained serious damage due to the fault and negligence of *YP 249*. Peti-

tioner elected to have the suit proceed in accordance with the principles of libels *in rem* as well as *in personam* R. 1-3).

The narrative of events and the allegations of fault are pleaded in the libel as follows:

"Third: On July 7, 1942 the *Cavelier*, laden with cargo, was bound on a voyage from a Canadian port to a Jamaican port. Her route was fixed by orders from the United States Naval authorities, and upon orders from United States Naval authorities the *Cavelier* approached the entrance to Delaware Bay for the purpose, in obedience to such orders, of entering Delaware Bay. When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* and attempted as ordered to enter Delaware Bay following directly astern of the *YP 249* but about 9:30 p.m., while proceeding directly astern of *YP 249* as ordered, the *Cavelier* struck a submerged wreck and sustained serious damage.

"Fourth: The aforesaid striking of the submerged wreck by the *Cavelier* and the damages resulting therefrom were not caused or contributed to by any fault or neglect on the part of the *Cavelier* or those in charge of her, the libellant herein, or anyone for whom the libellant may be responsible, but were due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.

2. She failed to keep a good look-out.

3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.

4. She led the *Cavelier* directly over a submerged wreck.

5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay."

Respondent appeared specially and excepted to the libel on the following grounds (R. 3-4):

"1. The libel fails to state a cause of action for which the United States has consented to be sued.

"2. The libel fails to state a cause of action within the provisions of the Public Vessels Act, 1925, or the Suits in Admiralty Act, 1920."

The Public Vessels Act, March 3, 1925, 43 Stat. 1112, Title 46 U. S. Code §§ 781-790, authorizes suit against the United States "for damages caused by a public vessel of the United States". Section 1 of the Public Vessels Act reads:

"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

The District Court, ignoring the *in rem* allegations of the libel against *YP 249*, concluded that the *Cavelier* sustained her damage because of the negligence of the personnel on board *YP 249* rather than the vessel herself and held that the United States has not consented to be sued for the negligence of the officers of its naval vessels (R. 4-5).

The majority of the Circuit Court of Appeals fell into the same error and reached the same conclusion. However, Biggs, C. J., understood that the allegations of the libel were properly allegations of fault against *YP 249* herself, *in rem*, and concluded that the *Cavelier's* damage was "caused by" *YP 249* and that the Public Vessels Act authorizes suit against the United States in the circumstances alleged in the libel (R. 15-22).

Question Presented

Does the Public Vessels Act, Title 46 U. S. Code §§ 781-790, authorize suit against the United States to recover for damages sustained by a privately owned vessel where a public (Navy) vessel of the United States leads such privately owned vessel, in convoy, into collision with a submerged wreck?

Reasons for Granting the Writ

1. The decision below is in conflict with earlier decisions in the First, Second and Third Circuits in the following cases: *New England Maritime Co.* v. *United States*, 55 F. (2d) 674, (D. C. Mass.), aff'd on opinion below, 73 F. (2d) 1016, C. C. A. 1; *Coastwise Transportation Corporation* v. *United States*, 43 F. (2d) 401, (D. C. Maine); *Porello* v. *United States*, 53 F. Supp. 569, (S. D. N. Y.); *McCormick Sand & Gravel Corporation* v. *United States* (not officially reported), 1938 A. M. 1569 (E. D. N. Y.), and *The Harding Highway*, 53 F. (2d) 938, C. C. A. 3.

2. The decision below unduly restricts the class of cases in which suit against the United States is authorized by the Public Vessels Act, contrary to the plain and expressed intention of the Congress.

3. The scope of the Public Vessels Act has never been passed upon by this Court and in view of the tremendous expansion of our Navy and the large number of non-collision cases where liability of the United States is asserted under the Public Vessels Act, it is important that this Court determine the scope of the Act for the guidance of the inferior courts.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 8429, October Term, 1943, Canadian Aviator Limited, Appellant, against United States of America, Appellee," and that the decision of the said Circuit Court of Appeals in said case be reversed and the jurisdiction sustained and that your petitioner have such other and further relief in the premises as may be just.

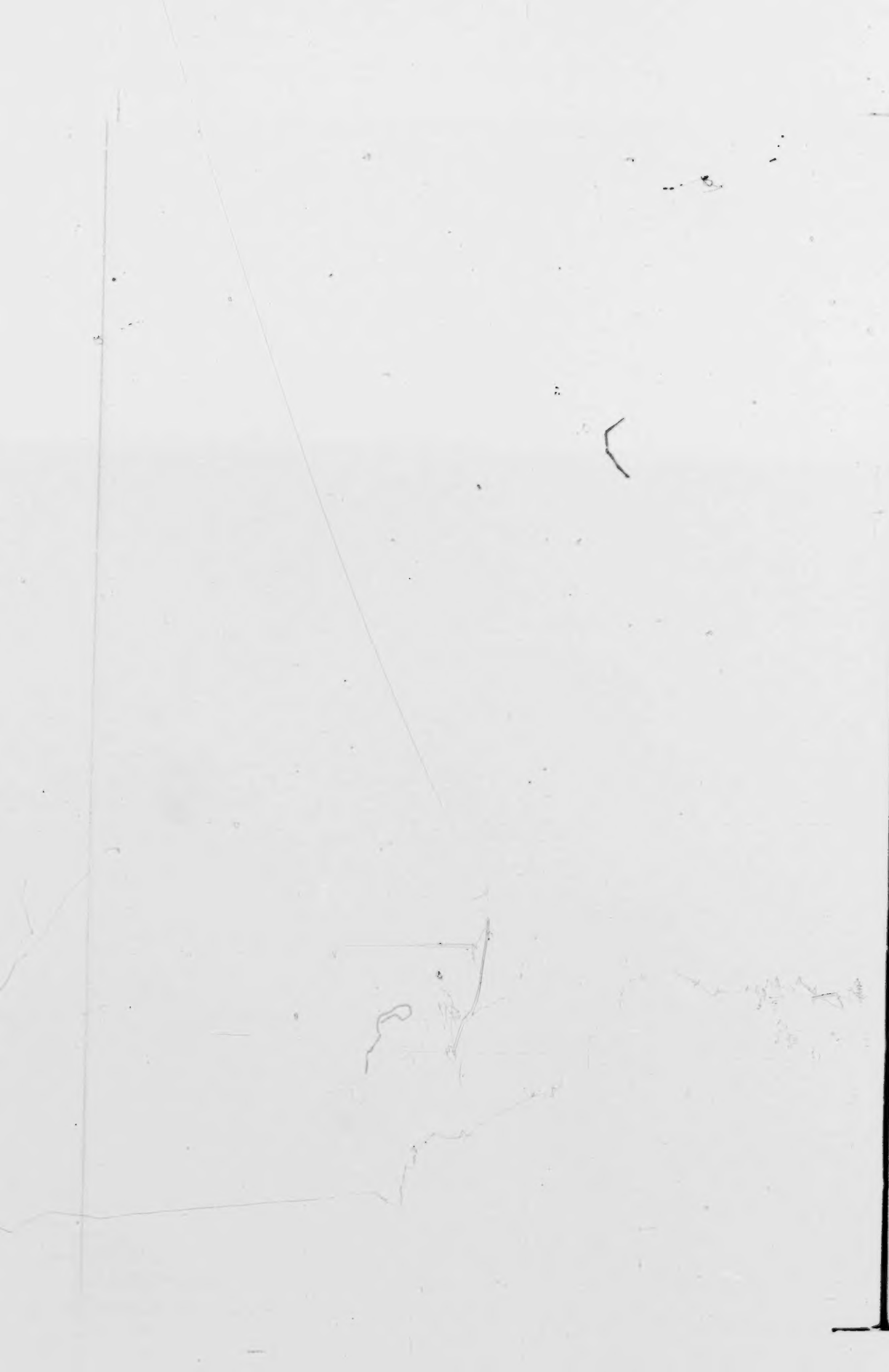
CANADIAN AVIATOR LIMITED,
By CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel.

Certificate

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel,
27 William Street,
New York 5, N. Y.

New York, N. Y.
July 20, 1944.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

CANADIAN AVIATOR LIMITED,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision below is in conflict with earlier decisions in the First, Second and Third Circuits.

While the majority below gave lip service to the proposition that the Public Vessels Act is not confined to collision cases it held that jurisdiction exists only where "the [public] vessel itself was the physical instrument by which the damage was done" (R. 11). This construction of the Act limits it to collision cases, in conflict with five prior decisions which the majority dismissed in a footnote (R. 10-11), or did not mention.

In *New England Maritime Co.* v. *United States*, 55 F. (2d) 674, D. C. Mass. affirmed on the opinion below, 73 F. (2d) 1016 (C. C. A. 1) suits were brought under the Public Vessels Act for the deaths of three members of the crew of the schooner *Mills* sunk in collision with the destroyer *Childs*. The three decedents survived the collision, i.e. they were not crushed or even touched by the destroyer. However, they were drowned in their ineffectual attempts to escape from the schooner before she sank. The destroyer was not the physical instrument of death. The District Court, affirmed by the Circuit Court of Appeals, held that the deaths were "caused by" the destroyer and allowed recovery. The District Court said:

> "I think the libellants in these death cases are correct in saying that a broad construction should be placed upon this Act, that it was obviously the purpose of the Act to waive the sovereign's immunity with respect to accidents on the high seas caused by public vessels, and thereby relieve Congress of the multiplicity of special acts necessary to compensate persons who had suffered damages either to their person or property. The statute is remedial, and, under well-settled practice of statutory construction, should be liberally construed" (p. 685).
>
> "In the instant case, after examining the proofs, and the cases brought before me, I am constrained to hold in these death cases that those who unfortunately lost their lives in this tragedy by drowning, are shown by the testimony to have been placed in a position of peril by the fault of the destroyer Childs. They lost their lives in an attempt to get to a place of safety. I find that the loss of their lives was nevertheless a **proximate result of** the fault of the defendant" (p. 687).

Coastwise Transportation Corporation v. *United States*, 43 F. (2d) 401 (D. C. Me.), involved a situation strikingly

similar to that at bar, the only difference being that the public vessel there was secured to the private vessel by a towline. There a Navy tug undertook to bring the merchant vessel into port and while doing so led her across shoal water so that she stranded and sustained damage. Here *YP 249* undertook to lead the *Cavelier* through the entrance to Delaware Bay and while so doing led her across a wreck so that she stranded and sustained damage. There jurisdiction under the Public Vessels Act was upheld.

In *Porello* v. *United States*, 53 F. Supp. 569 (S. D. N. Y.), respondent made the same argument it made below but the Court considered it untenable, saying:

> "The argument is that the words 'damages caused by a public vessel' refer to damage done physically by the vessel itself, as in the case of a collision, and not to damages for personal injuries caused by the negligence of employees. I do not think that this argument is tenable; * * *" (p. 569).

In *McCormick Sand & Gravel Corporation* v. *United States* (not officially reported), 1938 A. M. C. 1569 (E. D. N. Y.), the destroyer *Dahlgren*, proceeding at excessive speed, caused high waves which caused the tow of tug *Dauntless* to pound and sustain damage. Suit was brought against the United States to recover for the damage so sustained. There was no contact between the public and the private vessels. The Court held that the Public Vessels Act authorized suit in such circumstances.

In *The Harding Highway*, 53 F. (2d) 938 (C. C. A. 3), a government dredge, attempting to pass a privately owned ferryboat in the Christiana River, crowded the ferryboat so that the latter struck a stone jetty and sustained damage. There was no contact between the public and the

private vessel. Suit was brought under the Public Vessels Act * and the Circuit Court of Appeals held that the damage was "caused by" the public vessel and decreed a recovery against the United States.

See also *The Zeller No. 8*, 45 F. Supp. 359 (E. D. N. Y.), and *Haug v. United States*, 5 F. Supp. 418 (W. D. Wash.).

Biggs, C J., dissenting, fully appreciated the majority's brushing aside of the earlier decisions saying:

> "The majority opinion lays too great an emphasis upon the necessity of physical contact, such as that which ordinarily occurs in a collision, between the offending vessel and the injured vessel. This is demonstrated by the fact that the majority conceive of those decisions in which it has been held that a ship is entitled to damages for injuries sustained because she has run upon a jetty to avoid collision with another vessel or injuries have resulted to her because of swells caused by an offending vessel as an extension of waiver of immunity by the United States. See The Harding Highway, 53 F. (2d) 938; Coastwise Transp. Corp. v. The United States, 43 F. (2d) 401" (R. 15).

> "The accident occurred because the YP 249 led the Cavelier over the submerged wreck. True the submerged wreck caused the damage, but the instrument was the YP 249 which 'pulled' the Cavelier into the dangerous obstacle. Compare these facts with those of Coastwise Transp. Corporation v. United States, supra. The majority state that the YP 249 * * * * as a physical instrumentality, had no part in the matter.' This seems to me to be clearly an incorrect conclusion on the facts. The Cavelier followed the stern of the YP boat; the YP boat therefore was a physical instru-

* While it does not appear from the reported opinion that this was a suit under the Public Vessels Act we have examined the record on appeal to the Circuit Court of Appeals for the Third Circuit and find that the libel so alleges and that the answer of the United States admits the allegation of the libel that the dredge was a public vessel of the United States.

> mentality just as is the lantern which leads one down a path at night. Compare the tortious use of the dredge in The Harding Highway" (R. 21-22).

If, in *Coastwise Transportation Corporation* v. *United States*, supra, *McCormick Sand & Gravel Corporation* v. *United States*, supra, and *The Harding Highway*, supra, the public vessel was the physical cause of the damage to the private vessel although there was no contact, then *YP 249* was the physical cause of the damage sustained by the *Cavelier*.

The majority opinion below relied upon *The Osceola*, 189 U. S. 158, and *The Vera Cruz* (No. 2), 9 L. R. Prob. Div. 96 (1884). Both cases, however, interpreted a statute conferring jurisdiction of claims for damage "done by" a vessel, language much narrower than the words "caused by" used in the Public Vessels Act. Biggs, C. J., dissenting said:

> "I think these [the majority's] views are not assisted by the authority of The Osceola and The Vera Cruz (No. 2), supra. The provisions of Section 1 of the Public Vessels Act are broader than those of the Wisconsin Statute, R. S. 1898, Section 3348, which was before the Supreme Court in The Osceola, as they are likewise broader than those of the English Admiralty Court Act of 1861 which was sub judice in The Vera Cruz" (R. 17).

The majority opinion also relied upon *O'Neal* v. *United States*, 11 F. (2d) 869 (E. D. N. Y.), aff'd *per curiam* 11 F. (2d) 871 (C. C. A. 2), and *Dobson* v. *United States*, 27 F. (2d) 807 (C. C. A. 2) (R. 13). These cases have no bearing whatever on the point. The *O'Neal* case involved personal injuries sustained when a shell exploded without negligence on board a public vessel. The vessel was inert

and the injuries were neither done by nor caused by the vessel.

The *Dobson* case involved claims for the death of naval officers resulting from a collision on the high seas. The Court held that the Public Vessels Act did not create a right to recover for the death of a naval officer although "caused by" a public vessel, not because the language of the Act was not broad enough, but because of other statutory provision made by Congress to recompense such claims which the Court was not willing to infer that Congress had intended to repeal. If the majority opinion below in the case at bar construed the *Dobson* case as authority for the proposition that the Public Vessels Act does not authorize suit for deaths "caused by" collision, then the *Dobson* case and the Third Circuit are in conflict with the law in the First Circuit. See *New England Maritime Co. v. United States, supra*, 55 F. (2d) 674, D. C. Mass., aff'd on the opinion below, 73 F. (2d) 1016 (C. C. A. 1), where the Public Vessels Act was held to authorize suit against the United States for deaths "caused by" a public vessel.

SECOND POINT

The decision below is contrary to the purpose of the act as disclosed by its legislative history.

Congress did not intend to limit the waiver of sovereign immunity to collision cases. The bill which became the Public Vessels Act was H. R. 9535, 68th Congress. Its title is:

> "An Act authorizing suits against the United States in admiralty *for damage caused by* and salvage serv-

> ices rendered to public vessels belonging to the United States, and for other purposes" (43 Stat. 1112; italics ours).

Earlier in the same Congress a bill had been introduced to authorize suits in public vessel *collision* cases—H. R. 6989. Its title was:

> "A bill authorizing suits against the United States in admiralty *for collisions* caused by and salvage services rendered to public vessels belonging to the United States, and for other purposes" (italics ours).

The bill with the broader title, i.e. not limited to collision cases but extending to all cases of "damage caused by" public vessels, was enacted by Congress. The Committees on Claims of both Senate and House stated at the outset of their reports on the later bill (which was enacted) "H. R. 9535 is a substitute for H. R. 6989." See Senate Report No. 941, 68th Congress, 2nd Session; House Report No. 913, 68th Congress, 1st Session.

The title of the statute may be resorted to for clarification. *Bengzon* v. *Secretary of Justice*, 299 U. S. 410, 416.

The debates show that there was no purpose to limit the Public Vessels Act to collision cases. Mr. Underhill, who introduced the Act in the House, told the House that it allowed suit in admiralty by owners of vessels whose property had been damaged "by collision *or other fault* of Government vessels and Government agents" (see Appendix A, infra p. 27; italics ours).

Senator Bayard, who sponsored the Act in the Senate, said that it authorized suit for "damage from maritime accidents in which United States vessels are concerned * * * an accident by reason of the shortcomings of a United States ship" (see Appendix A, infra p. 27).

There is nothing in the remarks of any member of the House or Senate to indicate that the intention was to limit the Act to collision cases.

The Court below referred to the portions of the Committees' reports where it was said:

> "The *chief* purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as a result of a collision * * *" (R. 8-9; italics ours).

Doubtless collision claims outnumber all other types combined. However, neither Committee reported that the purpose of the Act was to afford relief in collision cases only. Both Committees said that the *chief* purpose was to grant relief in collision cases. The word is "chief", not "only". The very presence of the word "chief" establishes that the Act was not limited to collision cases.

If either Committee had intended to limit the Act to collision cases they would have reported H. R. 6989, which was so limited by its terms, rather than H. R. 9535, which became the Public Vessels Act.

That the reports of the Executive Departments included in the Committees' reports referred to cases of collision is no criterion of the scope of the Act because each such report was with reference to the prior bill, H. R. 6989, which was by its terms limited to collision cases. The majority opinion below asserts that

> "The fact that the Congressional committees appended the correspondence regarding H. R. 6989 to their reports on H. R. 9535 is strong evidence that they did not consider that the latter bill was substantially broader than the former one" (R. 11).

If by this the majority opinion means that Congress did not understand that it had broadened the waiver of sovereign immunity beyond collision cases by substituting H. R. 9535 for H. R. 6989 the decision below is clearly erroneous. See the comments of Senator Bayard and Mr. Underhill, supra, p. 45. The majority opinion goes on to say:

> "Certainly if Congress had contemplated that H. R. 9535 would permit suit against the United States for all damages resulting from the negligence of naval personnel aboard public vessels it would not have used this correspondence as it did, but would have submitted the new bill to the department heads for their views upon the desirability of such a radical departure from historic sovereign immunity" (R. 11).

We are disposed to agree with this surmise and do not contend that the Act permits suit "for all damages resulting from the negligence of naval personnel aboard public vessels". We are content with the plain language of the Act, "damages caused by a public vessel". However, the language last quoted casts light upon the reasons for the decision. The Court apparently thought that to sustain the jurisdiction here would be to hold that the Act authorizes suit "for all damages resulting from the negligence of naval personnel aboard public vessels". There is, of course, no such contention, nor has there been. We shall point out below in our Third Point that the libel here alleges a valid cause of action *in rem* against *YP 249*, i.e. "for damages caused by a public vessel of the United States".

Biggs, C. J., dissenting below, said:

> "The legislative history of the Public Vessels Act in my opinion does not support the majority view. The original bill, H. R. 6989, dealt specifically with 'collisions'. Naturally the correspondence from executive

officers of the government and others used the words 'collision' or 'collisions' in discussing the proposed measure. Referred to the Committee on Claims of the United States Senate, H. R. 6989 died. H. R. 9535 was then introduced, containing the broad language of the Act *sub judice*. Senator Bayard stated that this bill was designed to take care of 'all' claims 'caused by reason of the shortcomings of a United States ship'. See note 2 *infra*.

The Public Vessels Act like the Merchant Vessels Act was designed to lift from the shoulders of Congress the many and harassing claims arising out of the negligent operation of ships owned or operated by the United States and to substitute therefor actions in the District Courts of the United States subject to the conditions stated. Negligent operation of United States vessels may cause damage to ships in other ways than those indicated by the majority as being within the purview of the Act. Recovery by the injured ship was not limited by Congress to such a narrow scope" (R. 18-19).

THIRD POINT

The libel states a cause of action *in rem* within the jurisdiction conferred by the Public Vessels Act.

The Public Vessels Act plainly confers jurisdiction of claims *in rem*. Section 1 authorizes suit for damage "caused by a public vessel of the United States". The vessel is personified and spoken of as the offending thing.

In Section 2 the vessel is again personified. It provides that the

> "suit shall be brought in the District Court of the United States for the District in which *the vessel* or cargo *charged with creating the liability* is found" (italics ours).

Plainly this language contemplates liability *in rem*. It is the "vessel" that is referred to as the offender.

In his letter of recommendation to the Committee on Claims Mr. Chief Justice Stone, then Attorney General, declared his understanding that the bill contemplated liability *in rem*. He said—pp. 11-12 of Senate Report No. 941, 68th Congress, Second Session:

> "Suggestions which have come to my notice favoring the bill included the view that the practice of admiralty and international law and procedure place such torts separate and apart from ordinary torts committed on land as the vessel is defined the offender rather than the owner of the vessel.
>
> I do not understand from the proposed bill whether the relief to be granted shall be determined upon principles of *in rem* liability solely or whether it shall be determined both *in rem* and *in personam* liability."

Patently the then Attorney General understood that the Act contemplated *in rem* liability. The only question in his mind was whether the Act contemplated *in personam* liability in addition to *in rem* liability.

Furthermore, the Public Vessels Act expressly incorporates the provisions of the Suits in Admiralty Act, March 9, 1920, c. 95; 41 Stat. 521; 46 U. S. Code, § 744, et seq. Section 2 of the Public Vessels Act provides:

> "* * * Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed."

Chapter 20 referred to is the Suits in Admiralty Act, Section 3, which provides in part:

> "Such suits shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties * * *. If the libellant so elects in his libel, suit may proceed in accordance with the prin-

> ciples of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit. * * *" (46 U. S. Code, § 743).

By the two Acts, the Suits in Admiralty Act and the Public Vessels Act, Congress has plainly attempted to create an integrated system to afford redress to those who sustain damages caused by the merchant and public vessels of the United States. The two Acts are in *pari materia* and must be construed as part of the same legislative scheme. *State of Maine* v. *U. S.*, 45 F. Supp. 35, aff'd 134 F. (2d) 574 (C. C. A. 1), certiorari denied, 319 U. S. 772.

Mr. Chief Justice Stone, then Attorney General, understood that the Act was co-extensive with the Suits in Admiralty Act. In his letter to the Committee on Claims, Senate Committee Report No. 941, 68th Congress, page 11, he said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *."

In his dissent below, Biggs, C. J., said:

> "While suits authorized by the Acts must be brought against the United States by libels *in personam*, Congress intended to embrace within the scope of the Acts the kind of suits which could have been maintained by a libel *in rem* against a privately owned vessel as well as the kind of suits which could have been maintained by a libel *in personam* against the private owner of the ship because of the acts of his officers or crew. Section 2 of Merchants Vessels Act provides this specifically and both acts require substantially similar construction" (R. 16).

It is an ancient and firmly established principle of the admiralty (and it was to the admiralty, not the common law, court that Congress gave jurisdiction under the Public Vessels Act) that the vessel herself is a juristic person and that her acts and omissions, although actuated by her personnel, are personal acts of hers, for which she, as a juristic person, *in rem*, is legally responsible. *The Brig Malek Adhel*, 2 How. 210, 233, 234; *The China*, 7 Wall. 53, 68-9; *The Barnstable*, 181 U. S. 464, 467; *Ralli* v. *Troop*, 157 U. S. 386, 402-3; *The John G. Stevens*, 170 U. S. 113, 120.

The majority opinion below brushed aside the patent *in rem* liability contemplated by Congress on the ground that "the personalization of a ship has no significance in the absence of an enforceable maritime lien" (R. 14) and, since Section 8 of the Public Vessels Act expressly provides that no lien shall be created, Congress cannot have contemplated liability *in rem* (R. 14). Plainly the Court erred in this view because, if the existence of an enforceable maritime lien is essential, the Act does not authorize suit even in collision cases because the prohibition against liens contained in Section 8 is of universal application.

Congress *expressly* provided for liability *in rem* in the Suits in Admiralty Act and *expressly* incorporated the Suits in Admiralty Act in the Public Vessels Act. Why, unless it contemplated suits *in rem* under the Public Vessels Act as well as under the Suits in Admiralty Act? Furthermore, the absence of an enforceable lien is no bar to a proceeding against the sovereign on principles of *in rem* liability if the sovereign wishes to permit suit in that fashion. Since this Court's decision in *Clyde Mallory Lines* v. *United States*, 317 U. S. 395, it seems clear that

there is no enforceable lien against even a merchant vessel of the United States, yet no one denies that the sovereign has consented to be sued on principles of *in rem* liability in respect of its merchant vessels.

The majority opinion below, overlooking the plain allegations of *in rem* liability in the libel, chose to construe the allegations as in reality against the crew of *YP 249*, saying:

> "Libellant's complaint in reality* is of the negligence of the navigating officers of the YP 249 whose directions the Cavelier was following" (R. 15).

Biggs, C. J., dissenting, plainly saw the error of this view. He said:

> "If I am correct in my conclusion that it was the intention of Congress to impose on the United States the same liability (libel *in rem* aside) as is imposed by the Admiralty law on the private shipowner, the authorities which would support a judgment in favor of the libellant are legion. See The Kronprinzessin Cecile, 192 Fed. 27; The Compania, 203 Fed. 855; The Washington Irving, 250 Fed. 797; The Luke, 19 F. (2nd) 923, aff'd 19 F. (2nd) 925; The J. C. Hart, 43 F. (2nd) 566; The Favorita, 43 F. (2nd) 569. See also The Lyndhurst, 92 Fed. 681, in which a tug at night turned her tow adrift without proper lights. Her tow came into collision with another tug. The first tug was held to be at fault *in rem* for leaving her tow without lights. This is the equivalent of saying that she was at fault *in rem* because those in charge of her failed to light the tow" (R. 21).
>
> "The accident occurred because the YP 249 led the Cavelier over the submerged wreck. True the submerged wreck caused the damage, but the instrument was the YP 249 which 'pulled' the Cavelier into the dangerous obstacle. Compare these facts with those of Coastwise Transp. Corporation v. United States,

* In other words, the majority refused to accept the allegations of the libel as made.

supra. The majority state that the YP 249 ' . . . as a physical instrumentality, had no part in the matter.' This seems to me to be clearly an incorrect conclusion on the facts. The Cavelier followed the stern of the YP boat; the YP boat therefore was a physical instrumentality just as is the lantern which leads one down a path at night. Compare the tortious use of the dredge in The Harding Highway" (R. 21-22).

Plainly Biggs, C. J., was right. The first specification of fault in the libel is that *YP 249* "was not in charge of a competent person". It is well settled that *in rem* liability exists if the charge be proved. *The Teaser*, 229 Fed. 476 (E. D. Pa.); *The Prudence*, 190 Fed. 671 (E. D. Va.).

The second specification of fault in the libel is that "she failed to keep a good lookout". Here again *in rem* liability is clear if the charge be proved. *St. John* v. *Paine*, 10 How. 557, 585; *Newton* v. *Stebbins*, 10 How. 586, 607; *The Genesee Chief*, 12 How. 443, 463.

The third, fourth and fifth specifications of fault in the libel are that *YP 249* "failed to guide the *Cavelier* * * * She led the *Cavelier* * * * She failed to give the *Cavelier* proper or adequate guidance * * *". These are allegations that the vessel, a thing, a *res*, a legal entity, not her personnel, failed in her duty and clearly charge liability *in rem*. Compare *Coastwise Transportation Corp.* v. *U. S.*, *supra*, 43 F. (2d) 401.

FOURTH POINT

The libel states a cause of action *in personam* within the jurisdiction conferred by the Public Vessels Act.

The majority opinion below concluded that petitioner's complaint "in reality is of the negligence of the navigating

officers of the YP 249 * * *" (R. 15). Admittedly, therefore, the libel alleges a cause of action *in personam*. The Act authorizes suit on that theory as well as *in rem*. Section 2 of the Act, 46 U. S. Code, § 782, provides that suits therein authorized "shall be subject to and proceed in accordance with" the Suits in Admiralty Act. Section 3 of the Suits in Admiralty Act, 46 U. S. Code, § 743, provides that the libellant may elect to proceed as *in rem* but that "election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit".

Since the Suits in Admiralty Act is expressly incorporated in the Public Vessels Act the latter likewise authorizes suit *in personam*. In his report to the Committee on Claims concerning the Public Vessels Act when it was pending in Congress Mr. Chief Justice Stone, then Attorney General, said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *" (Senate Committee Report No. 941, 67th Congress, page 11).

In *Benedict on Admiralty*, 6th Edition, Volume I, the author, referring both to the Public Vessels Act and the Suits in Admiralty Act, says:

> "The Acts authorize suit where, if the government vessel were privately owned or operated or the cargo privately owned or possessed, 'a proceeding in admiralty could be maintained at the time of the commencement of the action' provided for in the Acts. The Acts do not say 'where a libel *in rem* could be maintained' but read 'a proceeding in admiralty', a

> generic term embracing in its natural connotation actions *in rem* and actions *in personam* both of which were separately specified in the original draft for which the final form has substituted a single but inclusive phrase. Equally clear is the implication of the provision that election to proceed upon the principles of libels *in rem* shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit" (Sec. 195, pp. 457-458).

This Court has expressly held that the Suits in Admiralty Act authorizes suit on a cause of action *in personam*. In *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, there was no possibility of *in rem* liability on the part of the United States because the government-owned vessel had been sunk and was a total loss. There was no longer a *res*. Suit was brought on the theory of liability *in personam*, the question of jurisdiction was squarely raised, and this Court held that suit on the theory of *in personam* liability was authorized.

Therefore, even if petitioner has no claim *in rem* and if, as the majority opinion below held, petitioner's complaint "in reality is of the negligence of the navigating officers of the YP 249" the libel should not have been dismissed because it states a cause of action *in personam*. Petitioner elected to proceed both *in personam* and *in rem*. Article sixth of the libel reads:

> "Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*" (R. 3).

LAST POINT

The question raised is of general importance.

The question here raised will arise again and again. Our fleet of "public" vessels has increased enormously, consisting of vessels operated by the Navy, Army, Coast Guard and other services. With every convoy go Naval escort vessels. The entrance to every important harbor is controlled by Naval vessels. The number of cases where Naval vessels compel the manouevres of privately owned vessels is, we believe, large. The number of cases where *in personam* liability is also claimed, because of directions given or withheld by Naval personnel is, we believe, likewise large. Many other cases are likely to be brought raising this and closely related questions. In view of the strong dissent below and the other points made above, it is respectfully submitted that the writ of certiorari prayed for should be granted, that the decisions below be reversed and the jurisdiction sustained, with costs.

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, N. Y., July 20, 1944.

APPENDIX A

Mr. Underhill's Remarks

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision *or other* fault of Government vessels and Government agents." Congressional Record, 68th Congress, 2nd Session, January 19, 1925, p. 2087 (italics ours).

Senator Bayard's Remarks

"Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered *damage from maritime accidents in which United States vessels are concerned*, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

Outside of that, there are many claims which must be settled by the Department of State, because our own nationals are forbidden going into our own Courts, and the nationals of other countries cannot come in, and this bill is to remedy that situation. It would give a person aggrieved because of *an accident by reason of the shortcomings of a United States ship* the right to go into a district court and prosecute his action." Congressional Record, 68th Congress, 2nd Session, February 12, 1925, p. 3560 (italics ours).

Supreme Court of the United States

OCTOBER TERM, 1941

No. 279

CANADIAN AVIATOR, LTD.,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is not reported except at 1943 A. M. C. 744. It is printed at pages 4-5 of the record.

The opinion of the Circuit Court of Appeals, and the dissenting opinion of Biggs, C. J., are reported at 142 F. 2d 709, and 1944 A. M. C. 732. They are printed at pages 7-15 and 15-22 respectively of the record.

Jurisdiction

Jurisdiction is based on Section 240(a) of the Judicial Code as amended, 28 U. S. Code § 347.

Statement

This is an admiralty suit by Canadian Aviator, Ltd., owner of steamship *Cavelier*, against the United States of America, owner and operator of Navy patrol boat *YP 249*, to recover damages sustained as a result of *No. 249's* leading the *Cavelier* over, and causing her to strike, a submerged wreck while entering Delaware Bay on the night of July 7, 1942.

The question presented is whether the Public Vessels Act, Title 46 U. S. Code, Sections 781-790, confers jurisdiction of such a suit.

This question arises upon exceptions to the libel. The pertinent allegations of the libel are as follows (R. 2-3):

> "THIRD: On July 7, 1942 the *Cavelier*, laden with cargo, was bound on a voyage from a Canadian port to a Jamaican port. Her route was fixed by orders from the United States Naval authorities, and upon orders from United States Naval authorities the *Cavelier* approached the entrance to Delaware Bay for the purpose, in obedience to such orders, of entering Delaware Bay. When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* and attempted as ordered to enter Delaware Bay following directly astern of the *YP 249* but about 9:30 p.m., while proceeding directly astern of the *YP 249* as ordered, the *Cavelier* struck a submerged wreck and sustained serious damage.
>
> FOURTH: The aforesaid striking of the submerged wreck by the *Cavelier* and the damages resulting

therefrom were not caused or contributed to by any fault or neglect on the part of the *Cavelier* or those in charge of her, the libellant herein, or anyone for whom the libellant may be responsible, but were due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.

2. She failed to keep a good look-out.

3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.

4. She led the *Cavelier* directly over a submerged wreck.

5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay.

* * * * * *

SIXTH: Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*."

Respondent's exceptions are as follows (R. 3-4):

FIRST: The libel fails to state a cause of action for which the United States has consented to be sued.

SECOND: The libel fails to state a cause of action within the provision of the Public Vessels Act, 1925, or the Suits in Admiralty Act, 1920.

Errors Intended to be Urged

The Court below erred in holding

1. That the libel does not allege a cause of action for damages "caused by" a public vessel of the United States;

2. That Congress intended to authorize suit only where the public vessel is "the physical instrument by which the damage was done";

3. That the Act does not authorize suit on principles of liability *in rem;* and

4. That to state a cause of action under the Act it is not enough to allege that the damages resulted from the negligence of those in charge of the public vessel.

Statute Involved

The Public Vessels Act, March 3, 1925, 43 Stat. 1112, Title 46 U. S. Code, §§ 781-790, provides in part as follows—the complete text of these sections is printed in the appendix, *infra*, page 25:

> § 1. "A libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States * * *."
>
> § 2. "Such suit shall be brought in the district * * * in which the vessel or cargo charged with creating the liability is found * * *. Such suits shall be subject to and proceed in accordance with the provisions of [the Suits in Admiralty Act] * * * in so far as the same are not inconsistent herewith, except that no interest shall be allowed * * *."

The Suits in Admiralty Act provides in part as follows—the complete text of the section is printed in the appendix, *infra*, page 26:

> § 3. "* * * If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit."

POINTS

I. The libel alleges a cause of action for damages "caused by a public vessel of the United States".

The libel alleges that about 9:30 p. m. July 7, 1942, libellant's steamship *Cavelier,* while following *YP 249* through the entrance to Delaware Bay as she had been ordered to do, was led by *No. 249* over a submerged wreck and sustained the damage in suit. The libel further alleges that its damages were caused solely by the negligence of *YP 249* and those in charge of her in five enumerated particulars (R. 2).

Section 1 of the Public Vessels Act authorizes suit against the United States "for damages caused by a public vessel of the United States". The libel plainly alleges that the *Cavelier,* in obedience to orders, was following *YP 249,* which led her on to the submerged wreck. It is difficult to see how the libel could more plainly allege that the damages were "caused by" a public vessel of the United States.

A majority of the Circuit Court of Appeals, however, expressed the view that although the language of the Act extended the waiver of sovereign immunity "beyond cases of actual collision to those cases in which the vessel is the *physical cause* of the injury *even though it does not come into actual physical contact* with the injured object", nevertheless it did not "extend the waiver of immunity beyond those cases in which the vessel itself was *the physical instrument by which the damage was done*" (italics ours; R. 10-11). We cannot reconcile these two concepts. If the jurisdiction is limited to those cases where the public vessel "was the physical instrument by which the damage

was done", then it cannot extend to cases of damage caused by the public vessel "even though it does not come into actual physical contact".

Both the language of the Act and the earlier decisions demonstrate the error of the view of the majority below. The Act authorizes suit for damage "caused" by the public vessel, not "done" by her. The word "caused" has a commonly accepted legal meaning and it is elementary that the words of a statute are to be interpreted in their ordinary and usual sense, with the meaning commonly attributed to them. *United States* v. *Stewart*, 311 U. S. 60, 63; *Lincoln* v. *Rickets*, 297 U. S. 373, 376; *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552, 560; *DeGaney* v. *Lederer*, 250 U. S. 376, 381.

This rule applies as well where the statute is to be construed strictly. In *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, this Court said:

> "It is said that the Harter Act is to be strictly construed. The Main v. Williams, 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent" (pp. 329-30).

In *Montclair* v. *Ramsdell*, 107 U. S. 147, this Court said:

> "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed" (p. 152).

It would be derogatory of Congress to hold that the words "caused by" were intended to have any other than the com-

mon legal meaning of the word "caused", viz., "proximate cause". Plainly the manoeuvre of *YP 249* was the proximate cause of the damage to the *Cavelier* and it is entirely fanciful to say, as did the majority below, that "the physical cause was the submerged wreck" (R. 14-15). It might as well be said that when a tug, by her negligent navigation, strands her tow, the strand rather than the tug's negligence is the proximate cause. Under a long line of decisions the proximate cause is that act or omission which sets in motion a chain of events resulting in damage. The libel in suit plainly alleges that *YP 249*, by setting her own course across the wreck, caused the *Cavelier* to strike the wreck and suffer the damage sued for.

This Court's decision in *Standard Oil Company* v. *United States*, 267 U. S. 76, affords a close parallel. There steamship *Llama* during the previous war was stopped by the British warship *Virginia* and ordered by those in command of the *Virginia* to proceed to Kirkwall by a specified route. While so proceeding the *Llama* struck a rock and was a total loss. She was insured under war risk policies which covered loss resulting from warlike acts, and under marine policies which covered loss from striking a rock. This Court had to determine whether the proximate cause of the loss was the striking of the rock, a marine peril, or the orders from the *Virginia*, a war peril. This Court held that the orders from the *Virginia* were the proximate cause. The analogy is unmistakable. The submerged wreck here was no more the proximate cause of the damage to the *Cavelier* than was the rock the proximate cause of the loss of the *Llama*. The manoeuvre of *YP 249* in leading the *Cavelier* over the submerged wreck was the proximate cause here just as the orders from the *Virginia* in fixing the *Llama's* route were the proximate cause of her loss.

In *The G. R. Booth*, 171 U. S. 450, a case of detonators exploded in a ship, opening her side allowing sea water to flow in causing cargo damage. The explosion was not a peril of the sea but the entry of the sea water was, and the question was whether the explosion or the entry of sea water was the proximate cause of the damage. This Court held that the explosion was the proximate cause because it set in motion the chain of events which resulted in the damage.

In *Milwaukee etc. Railway Co.* v. *Kellogg*, 94 U. S. 469, this Court laid down the applicable rule:

> "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown into the market place. 2 Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation" (pp. 474-5).

Plainly *YP 249* caused the *Cavelier* to strike the submerged wreck as surely as if, like the article on the other end of the chain, she had been pulled there by *YP 249*.

An interesting application of the proximate cause rule to an inanimate object is found in *Richardson* v. *Iowa State Travelling Men's Association*, 291 N. W. 408, Supreme Court of Iowa. There plaintiff's decedent, travelling in an Army airplane, was forced to jump when the plane ran out of gasoline and lost his life. The insurance policy provided that there should be no liability for death "caused by any aerial conveyance". Nevertheless claim was made on the policy on the theory that the decedent's death was

caused by his striking the ground. The Court, however, refused to accept such reasoning and held that the death was in fact "caused by" the airplane, although not by any contact. So here, although there was no physical contact between *YP 249* and the *Cavelier*, she "caused" the *Cavelier* to strike the submerged wreck and sustain damage.

There is nothing novel in the admiralty about holding that a vessel "caused" damage to another although she was not herself the physical instrument inflicting the damage. There are, for example, numerous "crowding" cases. These are cases where one vessel, in order to avoid colliding with another, alters her course and sustains damage by stranding or striking some third vessel or pier. It is uniformly held in these cases that the crowding vessel "caused" the damage, although not herself the physical instrument. *The Clevelander*, 83 F. 2d 947, C. C. A. 2; *The Lake Shore*, 201 Fed. 449, N. D. Ohio; *Barge Ruth C.*, 1926 A. M. C. 1508, S. D. N. Y.

There are also the swell damage cases, where one vessel, by her excessive speed, sets up heavy waves or swells which cause another to strike some third object and sustain damage. In these cases the Courts have uniformly held that the vessel setting up swells by her excessive speed "caused" the damage although not herself the physical instrument inflicting it. *The Kronprinzessin Cecilie*, 192 Fed. 27, C. C. A. 2; *The Campania*, 203 Fed. 855, C. C. A. 2; *The Washington Irving*, 250 Fed. 797, C. C. A. 2; *The Luke*, 19 F. 2d 923, aff'd 19 F. 2d 925, C. C. A. 2; *The J. C. Hart*, 43 F. 2d 566, E. D. N. Y.; *The Favorita*, 43 F. 2d 569, E. D. N. Y.

Prior Decisions Under the Public Vessels Act

There have been several decisions interpreting the Public Vessels Act in cases where the public vessel was not the physical instrument of the damage. In each of these the Courts have, without exception, sustained the jurisdiction, although there was no physical contact.

In *New England Maritime Co.* v. *United States*, 55 F. 2d 674, D. C. Mass., affirmed on the opinion below, 73 F. 2d 1016, C. C. A. 1, suits were brought under the Public Vessels Act for the deaths of three members of the crew of the schooner *Mills* sunk in collision with the destroyer *Childs*. The three decedents survived the collision, i. e. they were not killed, or injured, or even touched by the destroyer. However, they were drowned while attempting to escape from the schooner before she sank. The destroyer was not the physical instrument of death. Both the District Court and the Circuit Court of Appeals held that the deaths were "caused by" the destroyer and allowed recovery. The Court said:

> "I think the libellants in these death cases are correct in saying that a broad construction should be placed upon this Act, that it was obviously the purpose of the Act to waive the sovereign's immunity with respect to accidents on the high seas caused by public vessels, and thereby relieve Congress of the multiplicity of special acts necessary to compensate persons who had suffered damages either to their person or property. The statute is remedial, and, under well-settled practice of statutory construction, should be liberally construed" (p. 685).
>
> "In the instant case, after examining the proofs, and the cases brought before me, I am constrained to hold in these death cases that those who unfortunately lost their lives in this tragedy by drowning, are shown by the testimony to have been placed in a position of peril by the fault of the destroyer Childs. They lost their

> lives in an attempt to get to a place of safety. I find that the loss of their lives was nevertheless a proximate result of the fault of the defendant" (p. 687).

Coastwise Transportation Corporation v. *United States*, 43 F. 2d 401, D. C. Maine, involved a situation strikingly similar to that in suit. There a Navy tug undertook to bring libellant's vessel into port. While doing so she led libellant's vessel across shoal water where the latter stranded and sustained damage. The only difference between the two cases is that there the two vessels were attached by a hawser whereas here there was no attachment. Nevertheless, *YP 249* as surely controlled the course and movements of the *Cavelier* by her own movements (because the *Cavelier* had been ordered to, and did, follow in her wake) as the tug in the *Coastwise* case controlled the movements of libellant's vessel. There jurisdiction under the Public Vessels Act was upheld and recovery allowed.

In *Porello* v. *United States*, 53 F. Supp. 569, D. C. N. Y., the Court held that the damage need not be physically done by the public vessel to sustain the jurisdiction saying:

> "The argument is that the words 'damages caused by a public vessel' refer to damage done physically by the vessel itself, as in the case of a collision, and not to damages for personal injuries caused by the negligence of employees. I do not think that this argument is tenable: * * *" (p. 569).

In *McCormick Sand & Gravel Corporation* v. *United States* (not officially reported), 1938 A. M. C. 1569, D. C. N. Y., the destroyer *Dahlgren*, proceeding at an excessive speed, caused high waves which caused vessels in tow of tug *Dauntless* to pound against each other and sustain damage. Suit was brought against the United States to re-

cover for the damage although there was no physical contact between the damaged vessels and the public vessel. The Court upheld the jurisdiction and allowed recovery.

In *The Harding Highway*, 53 F. 2d 938, C. C. A. 3, a Government dredge, attempting to pass a privately owned ferryboat in the Christiana River, crowded the ferryboat which, giving way to avoid the dredge, struck a stone jetty and sustained damage. There was no contact between the dredge and the ferryboat. Suit was brought under the Public Vessels Act * and the Court sustained the jurisdiction and allowed recovery. The dredge there caused the ferryboat to strike the stone jetty as surely as *YP 249* here caused the *Cavelier* to strike the submerged wreck.

See also *The Zeller No. 8*, 45 F. Supp. 359, D. C. N. Y., and *Haug* v. *United States*, 5 F. Supp. 418, D. C. Wash.

Authorities Distinguished

The majority below referred to *The Osceola*, 189 U. S. 158, and *The Vera Cruz* (*No. 2*), 9 L. R. Prob. Div. 96 (1884), as bearing upon the point (R. 11-13). The majority's reliance upon these decisions points up its fundamental error in holding that the Act is limited to "those cases in which the vessel itself was the physical instrument by which the damage was *done*" (italics ours; R. 11). Both *The Osceola* and *The Vera Cruz* construe statutes conferring jurisdiction of claims for damage "*done* by" a vessel, language far narrower than the word

* While it does not appear from the reported opinion that this suit was under the Public Vessels Act, we have examined the record on appeal to the Circuit Court of Appeals for the Third Circuit and find that the libel so alleges and that the answer of the United States admits the allegation of the libel that the dredge was a public vessel of the United States.

chosen by Congress in the Public Vessels Act, viz., "*caused* by".

The majority below also sought support in *O'Neal* v. *United States,* 11 F. 2d 869, D. C. N. Y., aff'd 11 F. 2d 871, C. C. A. 2, and *Dobson* v. *United States,* 27 F. 2d 807, C. C. A. 2 (R. 13). These cases have no bearing on the point. The *O'Neal* case involved personal injuries sustained when a shell exploded without negligence on board a public vessel. The vessel herself was inert and the injuries were neither done by nor caused by the vessel, or her personnel, but by an exploding shell without negligence.

The *Dobson* case involved claims for the death of Naval officers resulting from a collision on the high seas. The Court held that the Public Vessels Act did not create a right to recover for the death of a Naval officer although "caused by" a public vessel, not because the language of the Public Vessels Act was not broad enough, but because Congress had made previous statutory provision to pay such claims and the Court was not willing to infer that Congress, by the Public Vessels Act, intended to repeal such prior and specific legislation.

II. The legislative history of the Public Vessels Act establishes that Congress did not intend to limit the waiver of sovereign immunity to cases where the public vessel was the physical instrument by which the damage was done.

If the Court below was right in holding that the Act is limited to cases where the public vessel is "the physical instrument by which the damage was done" (R. 11), then jurisdiction exists only in collision cases. Plainly, however, this was not the Congressional intent.

The first general waiver of sovereign immunity is contained in the Suits in Admiralty Act, March 9, 1920, 41 Stat. 525, 46 U. S. Code, §§ 741-752. This Act applies to merchant vessels only but extends to all damage caused by merchant vessels of the United States. Having rid itself of the need for considering a multitude of private Acts with relation to merchant vessels, Congress then proceeded to consider the waiver of sovereign immunity in public vessel cases. In the 68th Congress H. R. 6989 was introduced as a step toward that end. It was, however, limited to collision cases. Its title was:

> "A bill authorizing suits against the United States in admiralty *for collisions caused by* and salvage services rendered to public vessels belonging to the United States, and for other purposes" (italics ours).

Section 1 of H. R. 6989 provided:

> "That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by *collision* by a public vessel of the United States . . ." (italics ours).

This bill was referred to various Executive Departments for comment, following which the Committee on Claims of the House of Representatives reported a substitute bill, H. R. 9535. This bill was enacted by both Houses and became the Public Vessels Act. Senate Report No. 941, 68th Congress, 2nd Session.* The title of H. R. 9535, the substitute bill, was:

> "An act authorizing suits against the United States in admiralty *for damages caused by* and salvage serv-

* The substitute bill was reported to the House of Representatives by its Committee on Claims in Report No. 913, 68th Congress, 1st Session. After the substitute bill passed the House it was considered in and reported by the Senate Committee on Claims, Report No. 941, 68th Congress, 2nd Session. The Senate Committee adopted the report of the House Committee as its report. Hereafter in this brief references are to the Senate report.

> ices rendered to public vessels belonging to the United States, and for other purposes" (43 Stat. 1112; italics ours).

The title of the statute may be resorted to for clarification. *Bengzon* v. *Secretary of Justice*, 299 U. S. 410, 416.

Section 1 was broadened by striking out the words "by collision".

These changes are, we submit, of great significance in determining the purpose of the Act. If Congress had intended to limit the act to collision cases or cases where the public vessel was the "physical instrument" of damage, it could not have made these changes.

The debates in Congress establish that there was no purpose to limit the Act to collision or "physical instrument" cases. Mr. Underhill, who introduced in the House the bill which became the Public Vessels Act, told the House that it permitted suit in admiralty for damage "by collision *or other fault* of government *vessels* and government *agents*". He said:

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents." Congressional Record, 68th Congress, 2nd Session, January 19, 1925, p. 2087.

In the Senate, Senator Bayard, who sponsored the bill there, told the Senate that the bill allowed suit in cases of "maritime accidents in which United States vessels are concerned", accidents "by reason of the shortcomings of a United States ship". He said:

> "Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to

> reimburse people who have suffered *damage from maritime accidents in which United States vessels are concerned*, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.
>
> Outside of that, there are many claims which must be settled by the Department of State, because our own nationals are forbidden going into our own Courts, and the nationals of other countries cannot come in, and this bill is to remedy that situation. It would give a person aggrieved because of *an accident by reason of the shortcomings of a United States ship* the right to go into a district court and prosecute his action." Congressional Record, 68th Congress, 2nd Session, February 12, 1925, p. 3560 (italics ours).

There is nothing in the remarks of any member of the House or Senate to indicate that the intention was to limit the Act to collision or "physical instrument" cases.

The majority below thought that the substitute bill was no broader than the original bill because the Committees on Claims attached to their reports the letters from the Executive Departments which had reference to the earlier (collision) bill (R. 11). Such reasoning gives greater weight to the subject matter of the letters of the Departments than to the considered and deliberate changes in the language of the bill made by the Congress—and ignores the language chosen by the Congress.

The majority below considered that the attachment of the reports of the Executive Departments to the Committees' reports indicated that Congress did not intend to permit suit against the United States "for all damages resulting from the negligence of Naval personnel aboard public vessels" (R. 11). However that may be, we have not contended that the Act authorizes suit "for all damages resulting from the negligence of Naval personnel

aboard public vessels". The fact that the majority below thought it necessary to disavow such an intent by Congress is illustrative of its misapprehension of the allegations of the libel. The Act permits suit for damages caused by a public vessel both upon principles of liability *in rem* and *in personam* and the libel states a cause of action upon both such principles.

Suit on Principles of Liability in Rem

Section 1 of the Act personifies the vessel as the offending thing and contemplates liability on *in rem* principles. It authorizes suit for damages "caused by a public *vessel* of the United States" (italics ours).

The vessel is also personified in Section 2 which provides that the

> "suit shall be brought in the district court of the United States for the district in which the *vessel* or cargo *charged with creating the liability* is found."

Plainly this language contemplates liability *in rem* for the vessel is referred to as the offending thing.

In his letter of recommendation to the Committee on Claims Mr. Chief Justice Stone, then Attorney General, declared his understanding that the Act contemplated liability *in rem*. He said:

> "I do not understand from the proposed bill whether the relief to be granted shall be determined upon principles of in rem liability solely or whether it shall be determined both in rem and in personam liability." (Senate Report No. 941, 68th Congress, 2nd Session, page 12.)

The only question in the mind of the then Attorney General was whether the Act contemplated suit on prin-

ciples of *in personam* liability in addition to suit on principles of *in rem* liability.

Furthermore, the Public Vessels Act expressly incorporates the provisions of the Suits in Admiralty Act, March 9, 1920, c. 95; 41 Stat. 521; 46 U. S. Code, § 741 et seq. Section 2 of the Public Vessels Act provides:

> "• • • Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed."

Chapter 20 referred to is the Suits in Admiralty Act, Section 3 of which provides in part:

> "Such suits shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties • • •. If the libellant so elects in his libel, suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit. • • •" (46 U. S. Code, §743).

By the two Acts, the Suits in Admiralty Act and the Public Vessels Act, Congress has plainly attempted to create an integrated system to afford redress to those who sustain damages caused by the merchant and public vessels of the United States. The two Acts are *in pari materia* and must be construed as part of the same legislative scheme. *State of Maine* v. *U. S.*, 45 F. Supp. 35, aff'd 134 F. 2d 574, C. C. A. 1, certiorari denied, 319 U. S. 772.

Mr. Chief Justice Stone, then Attorney General, understood that the Public Vessels Act was co-extensive with the Suits in Admiralty Act. In his letter to the Committee on

Claims, Senate Committee Report No. 941, 68th Congress, page 11, he said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *."

It is an ancient and firmly established principle of the admiralty (and it was to the admiralty, not the common law, court that Congress gave jurisdiction under the Public Vessels Act) that the vessel herself is a juristic person and that her acts and omissions, although actuated by her personnel, are personal acts of hers, for which she, as a juristic person, *in rem*, is legally responsible. *The Brig Malek Adhel*, 2 How. 210, 233, 234; *The China*, 7 Wall. 53, 68-9; *The Barnstable*, 181 U. S. 464, 467; *Ralli* v. *Troop*, 157 U. S. 386, 402-3; *The John G. Stevens*, 170 U. S. 113, 120.

The majority below brushed aside the *in rem* liability obviously contemplated by Congress on the ground that "the personalization of a ship has no significance in the absence of an enforceable maritime lien" (R. 14) and, since Section 8 of the Public Vessels Act expressly provides that no lien shall be created, Congress cannot have contemplated liability *in rem* (R. 14).

Congress *expressly* provided for liability *in rem* in the Suits in Admiralty Act and *expressly* incorporated the Suits in Admiralty Act in the Public Vessels Act. Why, unless it contemplated suits on *in rem* principles under the Public Vessels Act as well as under the Suits in Admiralty Act? Furthermore, the absence of an enforceable lien is no bar to a proceeding against the sovereign on principles of *in rem* liability if the sovereign wishes to permit suit

in that fashion. Since this Court's decision in *Clyde Mallory Lines* v. *United States*, 317 U. S. 395, it seems clear that there is no lien against even a merchant vessel of the United States, yet no one denies that the sovereign has consented to be sued on principles of *in rem* liability in respect of its merchant vessels.

The majority below, overlooking the plain allegations of *in rem* liability in the libel, chose to construe the allegations as in reality against the crew of *YP 249*, saying:

> "Libellant's complaint in reality is of the negligence of the navigating officers of the *YP 249* whose directions the *Cavelier* was following" (R. 15).

Patently this view is erroneous. The libel alleges that *YP 249* was herself, as a physical thing, the *Cavelier's* guide through the waters of the entrance to Delaware Bay and that that physical object, which the *Cavelier* was following, so directed her own movements as to lead the *Cavelier* across and into collision with the submerged wreck. The libel does not allege that erroneous orders were given by some individual but that *YP 249* herself, a physical thing, in admiralty a legal entity, physically, by her own movements, negligently directed the movements of the *Cavelier* and caused her to collide with the wreck.

The specifications of fault in the libel (R. 2) are specifications of liability *in rem*. The first specification is that *YP 249* "was not in charge of a competent person". It is well settled that *in rem* liability exists if this charge be proved. *The Teaser*, 299 Fed. 476, D. C. Pa.; *The Prudence*, 190 Fed. 671, D. C. Va.

The second specification of fault is that "she failed to keep a good lookout". Here again *in rem* liability is clear if the charge be proved. *St. John* v. *Paine*, 10 How. 557,

585; *Newton* v. *Stebbins*, 10 How. 586, 607; *The Genesee Chief*, 12 How. 443, 463.

The third, fourth and fifth specifications of fault are that *YP 249* "failed to guide the *Cavelier* * * *. She led the *Cavelier* * * *. She failed to give the *Cavelier* proper or adequate guidance * * *". These are allegations that the vessel, a thing, a *res*, a legal entity, not her personnel, failed in her duty and clearly charge liability *in rem*. Compare *Coastwise Transportation Corp.* v. *United States*, *supra*, 43 F. 2d 401.

SUIT ON PRINCIPLES OF LIABILITY IN PERSONAM

Having reached the conclusion that the Act does not authorize suit on *in rem* principles (R. 13-14) the majority below proceeded to emasculate the Act by holding that it does not authorize suit in this case because libellant's complaint "in reality is of the negligence of the navigating officers of the *YP 249*, whose directions* the *Cavelier* was following" (R. 15).

The libel alleges faults against those in charge of *YP 249* in so controlling *YP 249* that she committed the *in rem* faults specified. The libel alleges:

> "Fourth: The aforesaid striking of the submerged wreck * * * were due solely to the fault and negli-

* There is no allegation in the libel that the *Cavelier* was following any directions received from any person on *YP 249*. The allegation is

> "When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* * * *" (R. 2)

> gence of the United States vessel *YP 249 and those in charge of her* in the following respects among others * * *" (R. 2; italics ours).

The Public Vessels Act authorizes suit on principles of libels *in personam* as well as upon principles of libels *in rem*. Section 1 of the Act provides that "a libel *in personam* in admiralty may be brought * * *" (italics ours).

Section 2 of the Act provides that the suits authorized "shall be subject to and proceed in accordance with" the Suits in Admiralty Act. Section 3 of the Suits in Admiralty Act, 46 U. S. Code, § 743, provides that the libellant may elect to proceed as *in rem* but that "election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit".

Since the Suits in Admiralty Act is expressly incorporated in the Public Vessels Act the latter likewise authorizes suit *in personam*. In his report to the Committee on Claims concerning the Public Vessels Act when it was pending in Congress Mr. Chief Justice Stone, then Attorney General, said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *" (Senate Committee Report No. 941, 67th Congress, p. 11).

In *Benedict on Admiralty*, 6th Edition, Vol. 1, the author, referring both to the Public Vessels Act and the Suits in Admiralty Act, says:

> "The Acts authorize suit where, if the government vessels were privately owned or operated or the cargo privately owned or possessed, 'a proceeding in admiralty could be maintained at the time of the commencement of the action' provided for in the Acts. The

> Acts do not say 'where a libel *in rem* could be maintained' but read 'a proceeding in admiralty', a generic term embracing in its natural connotation actions *in rem* and actions *in personam* both of which were separately specified in the original draft for which the final form has substituted a single but inclusive phrase. Equally clear is the implication of the provision that election to proceed upon the principles of libel *in rem* shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit". (Sec. 195, pp. 457-458).

This Court has expressly held that the Suits in Admiralty Act authorizes suit on causes of action *in personam*. *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

Below respondent contended that the Public Vessels Act incorporates the Suits in Admiralty Act solely for procedural purposes. This contention, however, ignores the express language of Section 2 of the Public Vessels Act, viz., "such suits *shall be subject to* and *proceed in accordance with*" the Suits in Admiralty Act (italics ours). The words "shall be subject to" must be given meaning and plainly relate to substantive rather than procedural provisions. Procedural provisions are dealt with by the words "proceed in accordance with". The words "shall be subject to" are meaningless surplusage if construed to refer only to the procedural provisions of the Suits in Admiralty Act.

Congress was quite competent to except from its incorporation of the Suits in Admiralty Act such parts of that Act as it wished to except. In Section 2 of the Public Vessels Act, which incorporates the Suits in Admiralty Act, Congress expressly provided that the provisions of the Suits in Admiralty Act for the allowance of interest

against the United States should not be applicable in Public Vessels Act cases.

Since petitioner has admittedly stated a cause of action *in personam*, the libel, and the jurisdiction, must be sustained. Petitioner has elected to proceed on principles of *in personam* as well as on principles of *in rem* liability. Article Sixth of the libel reads:

> "Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*" (R. 3).

III. The decree of the Circuit Court of Appeals should be reversed and the cause remanded with instructions to sustain the jurisdiction and require respondent to answer the libel on the merits, with costs.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, November 22, 1944.

APPENDIX

PUBLIC VESSELS ACT, March 3, 1925, 43 Stat. 1112, Title 46 U. S. Code, Sections 781-790.

Section 1: "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

Section 2: "Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest."

SUITS IN ADMIRALTY ACT, March 9, 1920, 41 Stat. 525, 46 U. S. Code, Sections 741-752.

Section 3: "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit. Neither the United States or such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act."

Supreme Court of the United States

OCTOBER TERM, 1944

No. 279

CANADIAN AVIATOR LTD.,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

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Respondent misunderstands the plain allegations of the libel and speaks of "the actions of naval authorities whose directions the *Cavelier* was following" (Brief, p. 16). True, the *Cavelier* had received orders to follow *YP 249*, but no complaint is made of those orders. When she struck the wreck the *Cavelier* was not following any orders as to her course. On the contrary, she was following *YP 249*. That vessel was not merely a means of communicating directions to the *Cavelier*, like a flag or a radio signal. The libel makes no suggestion that there was any communication between *YP 249* and the *Cavelier*. *YP 249* was herself, as a physical object, the *Cavelier's* guide—and led her astray.

Whether *YP 249* be considered merely as a means of conveying to the *Cavelier* the course she had to take in entering Delaware Bay, as respondent suggests (Brief,

p. 1[illegible]), the fact remains that *YP 249*, a legal entity in the admiralty, physically, by her own movements, led the *Cavelier* into collision with the submerged wreck and thereby "caused" the damage in suit.

We do not contend, as respondent asserts (Brief, p. 7), that the Act authorizes suit "whenever damages are caused by the negligence of the officers or crew of a public vessel or other officers who cause her to be used in a particular manner". Assuming respondent's definition to be precise, viz., that "the negligence of government servants creates liability under the Act only when a public vessel is the physical agent by which damages are caused" (Brief, p. 7), the jurisdiction here must be sustained. Note that the final word is the statutory "caused", rather than "done", sometimes substituted. The only question in this case is whether *YP 249* "caused" the *Cavelier* to strike the wreck and sustain damage. The libel alleges that she was the physical agent that led the *Cavelier* into the wreck.

Legislative history

Respondent suggests (Brief, pp. 11-12) that the omission of the word "collision" from the title and from Section 1 of the bill which became the Public Vessels Act, although those words were used in the prior bill, H. R. 6989, may be explained by "the draftsman's desire for greater accuracy of statement". On the contrary, the language of Section 1 of the prior bill, H. R. 6989, was accurate and would satisfy a purist. It provided for suit "for damages caused by collision by a public vessel". In the Act, however, the words "by collision" were omitted and Section 1 reads "for damages caused by a public vessel".

The full text of the prior bill, H. R. 6989, is printed as Appendix A to this brief, *infra*, pp. 9-11.

That the change in Section 1 was not editorial but substantial is established by the change in Section 3. In the prior bill, H. R. 6989, Section 3 provided:

> "Sec. 3. That in the event of the United States filing a libel in rem or in personam in admiralty for damages resulting *from collision* with a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off against the United States in such suit for and on account of any damages resulting *from such collision* (italics ours)."

In the substitute bill, which became the Act, Section 3 provides:

> "Sec. 3. That in the event of the United States filing a libel in rem or in personam in admiralty for *damages caused by a privately owned vessel*, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off or counter-claim against the United States in such suit for and on account of any *damages arising out of the same subject matter or cause of action: Provided*, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of this Act, the respondent in the cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given (italics ours)."

The original provision was limited to collision cases. The provision adopted is not so limited but extends to suits "for damages caused by a privately owned vessel" and cross libels for "damages arising out of the same subject matter or cause of action".

Respondent refers (Brief, p. 9) to the Act of December 28, 1922, 42 Stat. 1066, authorizing the Secretary of

the Navy to adjust claims not exceeding $3,000 as, in the language of the Committee, the "only general legislation covering the subject matter of the pending bill". The subject matter of that Act was not confined to collision cases. It provides that

> "The Secretary of the Navy is hereby authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages occasioned since the 6th day of April, 1917, where the amount of the claim does not exceed the sum of $3,000, occasioned by collisions *or damage incident to the operation of vessels* for which collisions *or other damage* vessels of the Navy or vessels in the Naval Service shall be found to be responsible, * * * (italics ours)."

Prior decisions

We have referred to *The Vera Cruz*, (No. 2) 9 L. R. Prob. Div. 96; *The Osceola*, 189 U. S. 158; *Dobson* v. *United States*, 27 F. 2d 807, C. C. A. 2, cert. denied 278 U. S. 653, and *O'Neal* v. *United States*, 11 F. 2d 869, aff'd 11 F. 2d 871, C. C. A. 2, at pages 12-13 of our main brief.

The Westmoor, 27 F. 2d 886 (Respondent's Brief, p. 13), did not arise under the Public Vessels Act and was not a suit against the United States. It merely held that where a ship master provides his guest with liquor to the point of intoxication, following which the guest falls, sustains injuries and dies, no lien against the vessel arises.

The President Madison, 17 F. 2d 526 (Respondent's Brief, p. 13), involved injuries resulting from the negligent handling of a gangway and the Court, construing a state statute, distinguished between damage done by the ship and damage done by her gangway wrongfully placed, and held that no lien arose.

Pedersen v. *The United States*, 14 F. Supp. 1008 (Respondent's Brief, p. 14), dealt with personal injuries sustained partly on board a public vessel and partly on the wharf. The Court held only that the Act did not authorize suit for the negligent use of appurtenances of the wharf and that libellant had failed to prove any negligence on the part of the public vessel herself. In the language quoted by respondent from this decision the Court was distinguishing between damage inflicted by the vessel or her appurtenance on the one hand and, on the other hand, damage inflicted by the appurtenances of the wharf.

Liability on *in rem* principles

Respondent suggests (Brief, pp. 17-20) a substantial difference in the coverage of the Public Vessels Act and the Suits in Admiralty Act. No difference is specified. By the terms of the Suits in Admiralty Act the Government is suable "in cases where if such [government] vessel were privately owned or operated • • • a proceeding in admiralty could be maintained." But private vessels are suable *in rem* only where they have "caused" damage and the scope of liability under the Public Vessels Act is likewise described by the word "caused".

Respondent's argument (Brief, p. 19) that the Suits in Admiralty Act is incorporated into the Public Vessels Act only for procedural purposes takes no account of the words "shall be subject to" in Section 2 of the Public Vessels Act—see our main brief, page 23.

The only provisions of the Suits in Admiralty Act excluded by the clause "in so far as the same are not inconsistent herewith" are those which deal differently with

subjects dealt with in both Acts. There is inconsistency only where a subject is dealt with in mutually exclusive terms in the two Acts. The Suits in Admiralty Act deals with *in rem* liability. The Public Vessels Act makes no express mention of the subject. There is, therefore, no inconsistency and the clause incorporating the Suits in Admiralty Act must be given effect in this respect.

Respondent asserts (Brief, pp. 18-19) that the reason for permitting suit on *in rem* principles in the Suits in Admiralty Act has no application to the Public Vessels Act and concludes that *in rem* liability under the Public Vessels Act was not contemplated. We submit that Congress intended to create by these two Acts an integrated system to afford redress to those who sustain damages caused either by a merchant or a public vessel of the United States. It was logical and consistent for Congress to allow suit on *in rem* and *in personam* principles under both Acts for the sake of consistency in the nature of the liability assumed with respect to the two classes of vessels.

Liability on *in personam* principles

At pages 21-24 of our main brief we made the point that the Public Vessels Act authorizes suit on *in personam* principles and that the libel alleges a cause of action on such principles, for which reason the jurisdiction must be sustained. In its brief respondent does not appear to challenge the point.

See *Arundel Corporation* v. *United States*, not officially reported, 1944 A. M. C. 1471.

Considerations of policy

Respondent, at pages 20-22, refers to various considerations, said to be of policy, as bearing upon the issues at bar. We submit that considerations of policy are for Congress. The language before the Court for interpretation is not obscure and the simple facts of this case call only for an interpretation of the statute as bearing upon that state of facts alone.

We do not agree that the successful maintenance of this suit would subject the United States to suit under all the circumstances so enthusiastically visualized by counsel.

We did not cite *Standard Oil Company* v. *United States*, 267 U. S. 76, in support of an argument that the United States would be liable if the *Virginia* had been a public vessel of the United States. We cited the case for the proposition which it fully supports, that the cause of the damage there, as here, was not the wreck or the rock upon which the vessel struck but rather the author of the course resulting in the stranding.

The libel states a cause of action

Respondent attempts to argue an exception not taken, viz., that the libel does not state a cause of action (Brief, pp. 23). The only exceptions taken, and the only exceptions considered below, raised only the jurisdictional question (R. 3-4).

The libel alleges with sufficient clarity in the third and fourth articles (R. 2) that *YP 249* negligently directed her course so as to lead the *Cavelier* into collision with the wreck. The allegations are that the striking was caused by "the fault and negligence of the United States vessel

YP 249 and those in charge of her". The existence of a duty is implicit in this allegation. As respondent says: "In the absence of a showing of a duty to the *Cavelier*, there could not be negligence on the part of *YP 249*" (Brief, p. 6).

Admiralty Rule 22 does not require that libels allege the legal duty claimed to have been breached but only "the various allegations of fact upon which the libellant relies in support of his suit".

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed and the cause remanded with instructions to sustain the jurisdiction and require respondent to answer the libel on the merits, with costs.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, N. Y.,
January 5, 1945.

APPENDIX A

H. R. 6989

In the House of Representatives

February 14, 1924

Mr. Underhill introduced the following bill which was referred to the Committee on Claims and ordered to be printed.

A BILL

Authorizing suits against the United States in admiralty for collisions caused by and salvage services rendered to public vessels belonging to the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by collision by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States; *Provided*, That the cause of action arose after the 6th day of April 1920: *Provided further*, That the consent of the Attorney General of the United States, in writing, to the maintenance of such suit is first obtained and filed with the libel: *And provided further*, That said consent is applied for within one year after the passage of this Act in all cases arising prior thereto, and in all other cases within one year after the cause of action arose, and that the libel in every case is filed within one year after the consent is granted.

SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the

vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them reside or have their principal place of business in the United States, and shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, in so far as the same are not inconsistent herewith.

SEC. 3. That in the event of the United States filing a libel in rem or in personam in admiralty for damages resulting from collision with a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off against the United States in such suit for and on accounnt of any damages resulting from such collision.

SEC. 4. That in any suit brought under this Act on a cause of action arising since April 6, 1920, and prior to the approval of this Act, where an investigation has been held by a department of the Government as to the facts of any such cause of action, and a witness can not be produced upon the trial, his testimony, given at the investigation, may be offered, by the United States, and when so offered shall be received in evidence.

SEC. 5. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the Secretary of the Department having control of the vessel at the time of cause of action arose.

SEC. 6. That no suit may be brought under this Act by the national of any foreign government unless it shall be certified by the Secretary of State that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

SEC. 7. That the Attorney General of the United States is hereby authorized to arbitrate, compromise, or settle any claim on which a libel or cross libel would lie under the provisions of this Act, and for which a libel or cross libel has actually been filed.

SEC. 8. That any final judgment rendered on any libel or cross libel herein authorized, and any settlement had and agreed to under the provisions of section 7 of this Act, shall upon presentation of a duly authenticated copy thereof, be paid by the proper accounting officer of the United States out of any moneys in the Treasury of the United States appropriated therefor by Congress.

SEC. 9. That the Attorney General of the United States shall report to the Congress at each session thereof all suits in which final judgment shall have been rendered and all claims shall have been settled under this Act.

SEC. 10. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

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No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1944

CANADIAN AVIATOR LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 4–5) is reported in 52 F. Supp. 211. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 7–22) is reported in 142 F. (2d) 709.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on May 2, 1944 (R. 22). The petition for a writ of certiorari was filed on July 21, 1944. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Public Vessels Act of 1925 authorizes a libel in admiralty against the United States to recover damages sustained by a privately owned vessel which, while complying with an order of United States naval authorities to follow directly astern of a public vessel of the United States, collided with a submerged wreck.

STATUTES INVOLVED

The Public Vessels Act, 1925 (43 Stat. 1112–1113, 46 U. S. C. 781–790), and the relevant portions of the Suits in Admiralty Act, 1920 (41 Stat. 525–526, 46 U. S. C. 741–752), are set forth in the Appendix, *infra*, pp. 12–16.

STATEMENT

On August 4, 1942, petitioner, owner of the steamship *Cavelier*, filed a libel *in personam* in admiralty against the United States in the United States District Court for the District of New Jersey, seeking to recover for damages to the *Cavelier*. The libel, in substance, alleged that on July 7, 1942, the *Cavelier*, while en route from Canada to Jamaica, was ordered by United States naval authorities to enter Delaware Bay; that upon approaching the entrance to the bay, the *Cavelier* was ordered by such authorities to follow

directly astern of the naval patrol boat *YP 249*, a public vessel of the United States; that while following directly astern of the *YP 249*, as ordered, "the *Cavelier* struck a submerged wreck and sustained serious damages;" and that the collision with the wreck and resultant damages were due "solely to the fault and negligence of the United States Vessel *YP 249* and those in charge of her" (R. 1–3).

On August 17, 1942, the United States appeared specially and excepted to the libel on the ground that it failed to state a cause of action for which the United States had consented to be sued (R. 3–4). The district court ruled that the damages to the *Cavelier* were not caused by the *YP 249*, but by the negligence of its officers (R. 4–5), and on June 22, 1943, entered a decree sustaining the exceptions and dismissing the libel (R. 5–6). On appeal, the Circuit Court of Appeals for the Third Circuit affirmed (R. 22), Judge Biggs dissenting (R. 15–22).

ARGUMENT

The suit at bar being against the United States, it cannot be maintained in the absence of a statutory waiver of sovereign immunity. Petitioner seeks to draw the requisite waiver from the Public Vessels Act of 1925, Section 1 of which provides that "a libel *in personam* in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United

States" (Appendix, *infra*, p. 12). The court below, however, held that the Act did not extend the waiver of sovereign immunity "beyond those cases in which the vessel itself was the physical instrument by which the damage was done" (R. 11), and since the injuries to the *Cavelier* were not caused by the *YP 249*, as such, but by the negligence of the naval officers whose directions the *Cavelier* was following, the court concluded that the damages were not "caused by a public vessel" within the meaning of the Act. This decision is correct and presents no conflict.

1. The Act applies only if the damages were "caused by a public vessel" (sec. 1 of the Public Vessels Act). The *YP 249* was in no sense the physical cause of the damage, for, as suggested below (R. 15), petitioner's grievance would have been no different if the naval authorities had directed the course of the *Cavelier* from shore by radio or from the *Cavelier's* own bridge instead of from the bridge of the *YP 249*. That this element is fatal to maintenance of a libel under the Public Vessels Act is reasonably clear from both the legislative history and judicial precedent under similar statutory language, which establish that the standard of recovery in Section 1 of the Act in question requires that the vessel as distinguished from its personnel constitute the cause of the damage. The report of the House Committee on Claims on the bill (H. R. 9535), which became the Public Vessels Act (a report adopted

in toto by the Senate Committee on Claims) states that—

> The chief purpose of this bill[1] is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act [before suit can be brought in the admiralty courts]. H. Rep. No. 913 68th Cong., 1st sess, p. 1; S. Rep. No. 941, 68th Cong., 2nd sess. p. 1.

The whole emphasis of the report is upon collision cases.[2] As the court below properly observed (R.

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[1] Petitioner's emphasis (Pet. 16) upon the word "chief" to support its construction of the Act is not persuasive since the word was obviously intended by the Committee to note awareness of the fact that Section 1 of the Act also permitted compensation for towage and salvage services rendered to a public vessel.

[2] For example, in referring to the "only general legislation covering the subject matter of the pending bill"—an Act authorizing the Secretary of the Navy to adjust claims not exceeding $3,000—the report (p. 5) characterizes that Act as "wholly inadequate, since the damages in collision cases are usually very large in amount." Again, in reviewing the practice of other countries, the report (*ibid.*) speaks of the English procedure "in the case of a collision" between a public and a private vessel. And the House Committee attached to its report letters from various governmental departments to the Committee on Claims, in reply to a request for their views upon a predecessor bill authorizing suits in admiralty for collisions caused by public vessels.

10), there is not "the faintest suggestion either in the correspondence [attached to the report] or in the report itself that the bill would effect a general waiver of the sovereign immunity from suit on all claims for damages resulting from the negligence of the personnel of a public vessel even though the vessel itself was not the physical instrument which did the injury."

The replacement of the earlier bill (H. R. 6989, allowing suits for collisions caused by public vessels) by the later bill (H. R. 9535, authorizing suits for damages caused by public vessels), does not show an intention to enlarge the scope of the waiver of immunity to the extent contended for by petitioner, for the committees favorably reporting the later bill attached to their reports the correspondence from the department heads regarding the earlier bill (H. Rep., *supra*, pp. 6–23; S. Rep., *supra*, pp. 6–23), and in the debates, the sponsors expressly stated that H. R. 9535, the later measure, had the approval of the governmental departments (66 Cong. Rec., 2088, 3560).[3] In

[3] The later bill was apparently the result of the departmental letters discussing the earlier bill, for most of the changes made by the later bill were suggested by the departmental letters.

Thus, as the Attorney General suggested, a requirement for securing the consent of the Attorney General prior to institution of any suit was deleted, the interest provision in Section 2 was modified to prevent interest from running until after judgment, and Section 3 was amended to require the posting of security by cross libelants. Similarly, in ac-

the words of the court below (R. 11), "certainly if Congress had contemplated that H. R. 9535 would permit suit against the United States for all damages resulting from the negligence of naval personnel aboard public vessels it would not have used this correspondence as it did, but would have submitted the new bill to the department heads for their views upon the desirability of such a radical departure from historic sovereign immunity."[4] The court below, therefore, reasonably concluded that the change in the phraseology of the bills from "collisions" to "damages" at most extended the waiver of immunity beyond actual collision cases to cases where the vessel is the "physical cause of the injury" although it does not come

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cordance with recommendations of the Secretary of State, the bill was given an earlier retroactive date, the courts rather than the State Department were to determine whether particular foreign countries granted reciprocity, and the phrase "head of any independent establishment" was added to Section 4. (See H. Rep., *supra*, pp. 6–7, 11–13; S. Rep., *supra*, pp. 6–7, 11–13.)

[4] The portions of the Attorney General's letter quoted in the petition (p. 19) are taken out of context. The petition omits the following sentence which immediately succeeds the first quoted sentence:

"The Supreme Court in the *Western Maid* group of cases (257 U. S. 419) has decided to the contrary. * * *"

And the second sentence of the quotation in the petition (p. 19) is taken out of a subsequent paragraph where the Attorney General was discussing the question of whether the proposed act limited recovery to the value of the vessel. The complete text of the letter appears in H. Rep. No. 913, 68th Cong., 1st sess., pp. 11–13, and in S. Rep. No. 941, 68th Cong., 2d sess., pp. 11–13.

into "actual physical contact with the injured object" (R. 10).

This construction is supported by decisions of this Court and the English Court of Appeals construing similar language in other statutes. *The Osceola*, 189 U. S. 158 ("damages arising from injuries done to persons or property by such ship"); *The Vera Cruz* (No. 2), 9 L. R. Prob. Div. 96 ("damages done by any ship"). The view that under the Public Vessels Act the vessel must be the physical instrument by which the damage is done is also reflected in *Dobson* v. *United States*, 27 F. (2d) 807 (C. C. A. 2), certiorari denied, 278 U. S. 653, which quotes from *The Osceola*, and in *O'Neal* v. *United States*, 11 F. (2d) 869 (E. D. N. Y.), affirmed, *per curiam*, 11 F. (2d) 871 (C. C. A. 2), which quotes from *The Vera Cruz*. Petitioner's contention would ignore these authorities as well as the principle that statutes waiving sovereign immunity must be strictly construed in favor of the Government. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Blackfeather* v. *United States*, 190 U. S. 368, 376; *Schillinger* v. *United States*, 155 U. S. 163, 166.

2. Petitioner asserts (Pet. 18–23) that the Act imposes liability in any circumstances where the vessel "as a juristic person" would be liable *in rem* for acts and omissions of her personnel. This construction of the Act finds no support in its

language or its legislative history. And unlike the Suits in Admiralty Act of 1920, which authorizes a libel *in personam* against the United States "in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained" (sec. 2), the Public Vessels Act authorizes such a libel only where the damage is "caused by a public vessel."[5] Section 2 of the Public Vessels Act, providing that suits thereunder "shall be subject to and proceed in accordance with the provisions" of Section 3 of the Suits in Admiralty Act "insofar as the same are not inconsistent herewith," is intended merely to incorporate the procedure for trial of suits authorized by Section 1 of the Public Vessels Act. Even if Section 3 of the Suits in Admiralty Act also extended to substantive matters, it could not broaden the liability imposed by Section 1 of the Public Vessels Act, for the Section would then be "inconsistent" with Section 3 of the earlier Act to that extent.

3. Contrary to petitioner's contention (Pet. 5, 9–14), the decision below does not present a con-

[5] Petitioner's intimation (Pet. 20) that the Act is "coextensive" with the Suits in Admiralty Act is plainly unsound. The use of entirely different language in Section 1 of the Public Vessels Act and Section 2 of the Suits in Admiralty Act (each delineating the scope of the Act involved) cannot be attributed to accident, since where Congress wished to adopt the same provisions for both Acts, as in the case of procedure, it did so expressly (sec. 2 of the Public Vessels Act).

flict with other decisions so as to merit review by this Court. In *The Harding Highway*, 53 F. (2d) 938, an earlier decision of the court below, the jurisdictional question involved was neither urged nor considered, and a majority of the court below did not regard that case as a controlling precedent. The only other circuit court of appeals case cited by petitioner, *New England Maritime Co.* v. *United States*, 55 F. (2d) 674 (D. C. Mass.), affirmed *sub nom. United States* v. *Gould* on the opinion below, 73 F. (2d) 1016 (C. C. A. 1), involved an actual collision, and the only question considered by the court was whether the Public Vessels Act allows suit for damages to persons as well as property.[6]

[6] There is no conflict with decisions of district courts, for in each cited case the vessel was "the physical cause" of the damage. In *Coastwise Transportation Corp.* v. *United States*, 43 F. (2d) 401 (D. C. Me.), which is of doubtful validity even on the merits (cf. *The Sarnia*, 261 Fed. 900 (C. C. A. 2)), a private vessel attached by a towline to a Navy tug struck a reef. In *McCormack Sand and Gravel Corp.* v. *United States*, 1938 A. M. C. 1569 (E. D. N. Y.), where the jurisdictional question was not even considered, scows were damaged by swells negligently set up by a United States destroyer. In *Porello* v. *United States*, 33 F. Supp. 569 (S. D. N. Y.), the issue was whether a stevedore injured on a public vessel could sue under the Act. The opinion of the court is rather ambiguous. However, the departmental files reveal that the stevedore's injuries were caused by falling hatch covers and hatch beam, so that it may be said that the vessel was "the physical cause" of the damage.

CONCLUSION

The decision below is correct and involves no conflict. Therefore, we respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1944.

APPENDIX

1. The Public Vessels Act, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant ves-

sels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

SEC. 3. That in the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: *Provided*, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of this Act, the respondent in the cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given.

SEC. 4. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena.

SEC. 5. That no suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

SEC. 6. That the Attorney General of the United States is hereby authorized to arbitrate, compromise, or settle any claim on which a libel or cross libel would lie under the provisions of this Act, and for which a libel or cross libel has actually been filed.

SEC. 7. That any final judgment rendered on any libel or cross libel herein authorized, and any settlement had and agreed to under the provisions of section 6 of this Act, shall, upon presentation of a duly authenticated copy thereof, be paid by the proper accounting officer of the United States out of any moneys in the Treasury of the United States appropriated therefor by Congress.

SEC. 8. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

SEC. 10. That the Attorney General of the United States shall report to the Congress at each session thereof all suits in which final judgment shall have been rendered and all claims which shall have been settled under this Act.

2. The Suits in Admiralty Act, 41 Stat. 525 (46 U. S. C. 741–752), provides in part as follows:

SEC. 2. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. Such suits shall proceed and shall be heard and determined according to the

principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title.

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No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1944

CANADIAN AVIATOR LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 4–5) is reported at 52 F. Supp. 211. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 7–22) is reported at 142 F. (2d) 709.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on May 2, 1944 (R. 22). The petition for a writ of certiorari was filed on July 21, 1944

and was granted on October 9, 1944 (R. 24). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Public Vessels Act of 1925 authorizes a libel *in personam* in admiralty against the United States to recover damages sustained by a privately owned vessel which, while complying with an order of the United States naval authorities to follow directly astern of a public vessel of the United States, collided with a submerged wreck.

STATUTES INVOLVED

The Public Vessels Act of 1925 (43 Stat. 1112–1113; 46 U. S. C. 781–790), and the relevant portions of the Suits in Admiralty Act of 1920 (41 Stat. 525–526; 46 U. S. C. 741–752), are set forth in the Appendix, *infra*, pp. 25–30.

STATEMENT

On August 4, 1942, petitioner, owner of the Canadian steamship *Cavelier*, filed a libel *in personam* in admiralty against the United States in the United States District Court for the District of New Jersey, seeking to recover for damages to the *Cavelier*. The libel in substance alleged that the *Cavelier*, while voyaging in 1942 between Canada and Jamaica on a route fixed by United States naval authorities, was ordered by them to enter

Delaware Bay; that while approaching the Bay the *Cavelier* received further orders from the naval authorities to enter the Bay by following directly astern of the naval patrol boat *YP 249*, a public vessel of the United States; that while following directly astern of the *YP 249* as instructed, the *Cavelier* struck a submerged wreck and sustained serious damages; and that the collision with the wreck and resultant damages "were due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her" (R. 1–3).

On August 17, 1942, the United States appeared specially and excepted to the libel on the ground that it failed to state a cause of action for which the United States had consented to be sued, and that the libel failed to state a cause of action within the meaning of the Public Vessels Act (R. 3–4). The District Court ruled that the damages to the *Cavelier* were caused not by the *YP 249*, but by the negligence of its officers (R. 4–5), and on June 22, 1943, entered a decree sustaining the exceptions and dismissing the libel (R. 5–6). On appeal, the Circuit Court of Appeals for the Third Circuit affirmed (R. 7–15, 22), Judge Biggs dissenting (R. 15–22).

SUMMARY OF ARGUMENT

I

The Public Vessels Act, the sole basis for the suit at bar, waives sovereign immunity only if the damages for which recovery is sought are "caused

by a public vessel of the United States." There is not here involved that tortious use of a public vessel *qua vessel* which is made actionable by that Act.

A. The Committee reports and Congressional debates preceding the passage of the Act demonstrate a predominate concern with cases of collision involving Government vessels. The original bill, which provided for suits only for collisions, was indorsed by the interested department heads, and the action of the committees in attaching the departmental correspondence to their reports on the later bill (containing the coverage phrase ultimately enacted) indicates that no major enlargement of the scope of waiver was intended or contemplated. The committee reports on the later bill mention no type of claim other than collision.

B. The words of limitation in the Act—"damages caused by a public vessel"—find a close analogy in English and American statutes making actionable "damages done by a ship," which have consistently been construed to require that the ship be the physical cause of the injury. *The Vera Cruz* (No. 2), 9 L. R. Prob. Div. 96; *The Osceola*, 189 U. S. 158. Decisions under the Public Vessels Act permitting recovery in "swell damage" and "crowding" cases, which reach the outer limits of the Act's coverage, do not support

the extension sought here. Unlike the situation in those cases, the damage to the *Cavelier* was not basically caused by a public vessel; the same result would have occurred if the erroneous course had been set for the *Cavelier* by radio or otherwise.

C. Section 2 of the Act, which provides that suits thereunder shall be subject to and proceed in accordance with the Suits in Admiralty Act of 1920 "in so far as the same are not inconsistent" with the 1925 Act, does not authorize a suit wherever one could have been brought under the earlier act. The incorporation here is procedural only; for to the extent that the substantive scope of the two acts would otherwise differ, the 1925 Act would be "inconsistent" with the 1920 Act. That the scope of the two statutes is not coextensive is to be gathered from the use of markedly different words of coverage.

D. Strong considerations of policy support the decision below. To impose liability in the facts at bar might extend the Act to all cases of damage to ships in convoy resulting from a faulty course set in time of war by officers aboard naval vessels, whether the stern of the public vessel were used to mark the course (as in the instant case) or other navigational guides were used. Such an enlargement of the Act's application should not be made without a clearer manifestation of Congressional purpose than the Act now contains.

II

The libel fails to allege or demonstrate that any duty was assumed or owing by the *YP 249* to the *Cavelier*. In the absence of a showing of a duty to the *Cavelier*, there could not be negligence on the part of the *YP 249*. The libel was therefore properly subject to dismissal for this reason also.

ARGUMENT

PETITIONER'S LIBEL WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION FOR WHICH THE UNITED STATES HAS CONSENTED TO BE SUED

I. THE HOLDING OF THE COURT BELOW THAT A PUBLIC VESSEL MUST BE THE PHYSICAL INSTRUMENT BY WHICH DAMAGE WAS CAUSED IS CORRECT

The suit at bar being against the United States, it cannot be maintained in the absence of a statutory waiver of sovereign immunity. *United States* v. *Sherwood*, 312 U. S. 584, 586. Petitioner seeks to draw the requisite waiver from the Public Vessels Act of 1925, Section 1 of which provides that "a libel *in personam* in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States" (Appendix, *infra*, p. 25). The words "for damages caused by a public vessel" constitute a limitation on the statutory waiver of immunity, and the court below in dismissing petitioner's libel gave effect to those words of

limitation in holding that the Act does not extend "beyond those cases in which the vessel itself was the physical instrument by which the damage was done"[1] (R. 11). Petitioner, however, would disregard the fact that the United States has consented only to libels "for damages caused by a public vessel", and suggests in substance that liability is incurred under the Act whenever damages are caused by the negligence of the officers or crew of a public vessel or other officers who cause her to be used in a particular manner. Nothing, however, in the legislative history of the Act, the course of adjudication pursuant thereto, or the considerations of policy motivating its adoption, supports petitioner's attempt to extend the Act's coverage beyond the limitation declared by the court below. In the ordinary and intended meaning of the Act's words of limitation, we submit, the negligence of government servants (not ordinarily actionable against the United States) creates liability under the Act only when a public vessel is the physical agent by which damages are caused.

A. Legislative History

H. R. 9535, the bill which became the Public Vessels Act, contained the coverage provisions

[1] The district court, in dismissing the libel, similarly held that the public vessel involved was not the "proximate" or "efficient cause" of the damage (R. 5).

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here involved: "damages caused by a public vessel of the United States." The opening paragraph of the report on that bill by the House Committee on Claims (which was adopted *in toto* by the Senate Committee on Claims) stated that:

> The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged *as the result of a collision with any Government-owned vessel*, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act. [H. Rep. No. 913 (68th Cong., 1st Sess.) p. 1; S. Rep. No. 941 (68th Cong., 2nd Sess.) p. 1 (Emphasis supplied).]

Further analysis of the report reveals that the Committee, in drafting the bill, had in mind only cases of direct physical impact by collision.[2] Thus, in describing the need for the proposed legislation, the report (p. 2) points to the fact that whereas "no judicial relief is available to a ship owner for damages caused by the negligent navigation of a public vessel of the United States," the United States, not suffering from such disability, "has

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[2] Such analysis makes clear that the use of the word "chief" to qualify the word "purpose" in the first line of the opening paragraph was intended by the Committee simply to note awareness of the fact that Section 1 of the Act also permitted compensation for towage and salvage services rendered.

its day in court * * * and, when the Government vessel is found to have been at fault, refuses to pay the damages sustained by the private owner."[3] Again, in referring to the "only general legislation covering the subject matter of the pending bill"—the Act of December 28, 1922, authorizing the Secretary of the Navy to adjust claims not exceeding $3,000—the report (p. 5) characterizes that act as "wholly inadequate, since the damages in collision cases are usually very large in amount." Furthermore, in describing the English practice as regards "the very claims now under consideration," the report (p. 5) discusses "the case of a collision between a British public vessel and the ship of a subject or foreigner" but mentions no other type of claim. Manifestly, as the court below observed with respect to the Committee reports (R. 10), there is not "the faintest suggestion in [them] that the bill would effect a general waiver of the sovereign immunity from suit on all claims for damages resulting from the negligence of the personnel of a public vessel even though the vessel itself was not the physical instrument which did the injury."

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[3] A result which, of course, could only occur in collision cases causing mutual damage. See also the report at p. 4: "Ship owners, whose vessels have suffered a collision with any Government-owned ship * * * must apply to Congress for a special enabling act before suit can be brought in the admiralty courts."

Petitioner seeks to emphasize (Br. 14–15) the replacement of an earlier bill (H. R. 6989, allowing suits for "collisions" caused by public vessels) by the later bill H. R. 9535 (authorizing suits for "damages" caused by public vessels) which became the Act. However, comparison of these bills and reference to the Committee reports shows that the primary reason for supplanting the earlier bill was to incorporate changes not here relevant, suggested by department heads in correspondence with the Committee concerning the earlier bill.[4] Indeed, this very correspondence was incorporated in the Committee reports on H. R. 9535 (the later bill) with the express statement (p. 6) that the departmental letters endorsed the new bill. And in the debates the sponsors expressly stated, on the basis of this correspondence approving a waiver of immunity confined by the terms of H. R. 6989 to collision cases, that H. R. 9535

[4] Thus, as the Attorney General suggested, a requirement for securing the consent of the Attorney General prior to institution of suit was deleted; the interest provision in Section 2 was modified to prevent interest from running until after judgment; and Section 3 was amended to require the posting of security by a cross libellant. Similarly, in accordance with the recommendation of the Secretary of State, the bill was given an earlier retroactive date, the courts rather than the State Department were vested with power to determine whether particular foreign countries granted reciprocity, and the phrase "head of any independent establishment" was added to Section 4. (See H. Rep. *supra*, pp. 6–7, 11–13; S. Rep. *supra*, pp. 6–7, 11–13).

had the approval of the governmental departments (66 Cong. Rec. 2088, 3560). As the court below stated (R. 11), "certainly if Congress had contemplated that H. R. 9535 would permit suit against the United States for all damages resulting from the negligence of naval personnel aboard public vessels, it would not have used this correspondence as it did, but would have submitted the new bill to the department heads for their views upon the desirability of such a radical departure from historic sovereign immunity."[5] The substitution of "damages" for "collision," in the context of these legislative materials, is more plausibly explained by the draftsman's desire for greater accuracy of statement (i. e., the suit is "for" the damages re-

[5] Petitioner's reliance on other statements of the Congressional sponsors of the bill to demonstrate an intention substantially to widen the coverage of the Act beyond that proposed in H. R. 6989, is misplaced. The remarks of Senator Bayard (66 Cong. Rec. 3560, quoted at pp. 15–16 of Pet. Br.) in no way appear to be in conflict with the interpretation given to the Act by the court below. The isolated remark of Representative Underhill (66 Cong. Rec. 2087) that the bill would allow suits for damages inflicted "by collision or other fault of Government vessels and Government agents" cannot be accorded material significance in view of the foregoing overwhelming evidence of an intention to restrict the Act's coverage to cases of physical impact. It is to be noted that even petitioner disclaims the literal meaning of Representative Underhill's reference to the fault of Government agents by stating (Pet. Br. 16–17) "We have not contended that the Act authorizes suit 'for all damages resulting from the negligence of Naval personnel aboard public vessels.'"

sulting from the collision, not "for" the collision).[8]

B. Adjudications Under the Act and Similar Statutes

As the court below noted (R. 11), Congress, in using the phrase "damages caused by a public vessel" was not using language unfamiliar to the law. In *The Vera Cruz* (No. 2), 9 L. R. Prob. Div. 96, a statute making actionable "damage done by any ship" (Admiralty Court Act, 1861, 24 Vict. c. 10 s. 7) was under consideration, in an action for the death of a master of a vessel who was thrown into the water and drowned following a collision between that vessel and the *Vera Cruz*. Denying recovery, the Master of the Rolls held that the statute applied only where "a ship was the active cause, the damage being physically caused by the ship" (p. 99), and in the same case Judge Bowen stated (pp. 100–101):

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[8] The majority of the court below suggested that (R. 10) "this change in the phraseology of the bill was intended to extend the waiver of immunity beyond cases of actual collision to those cases in which the vessel is the physical cause of the injury even though it does not come into actual physical contact with the injured object." The court cited, as examples of the broader coverage, *Coastwise Transp. Corp.* v. *United States*, 43 F. (2d) 401 (D. Me.), in which a Navy tug pushed or pulled its tow onto a reef; *The Harding Highway*, 53 F. (2d) 938 (C. C. A. 3), where a Government-owned dredge crowded a ferryboat into a jetty; and *McCormack Sand & Gravel Corp.* v. *United States*, 1938 A. M. C. 1569 (E. D. N. Y.), where a destroyer set up swells which damaged scows.

> "Shortly, the question is, whether this is a claim for damage done by a ship, and I think that the history of the law on this point proves that it is not. Apart from that, however, the obvious meaning of the act leads to the same conclusion—for the act gives a claim for compensation for damages done by the ship—this, and this only, is the cause of action. 'Done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument."

This Court in *The Osceola,* 189 U. S. 158, similarly construed a state statute providing *in rem* liability "for all damages arising from injuries done to persons or property by * * * [a] ship" (Rev. Stat., Wis., 1898, Sec. 3348). Denying recovery to a seaman for injuries suffered on his own vessel as a result of the master's negligence, this Court stated (189 U. S. at 176):

> The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases where the damage is done by the ship herself, as the offending thing * * * through the negligence or mismanagement of the ship by the officers or seamen in charge * * *.

See also *The Westmoor,* 27 F. (2d) 886 (D. Ore.); *The President Madison,* 17 F. (2d) 526, 528 (W. D. Wash.). The view that under the Public Vessels Act the vessel must be the physical instrument

by which the damage is done is also reflected in *Dobson* v. *United States*, 27 F. (2d) 807 (C. C. A. 2), certiorari denied, 278 U. S. 653, which quotes from *The Osceola*, and in *O'Neal* v. *United States*, 11 F. (2d) 869 (E. D. N. Y.), affirmed *per curiam*, 11 F. (2d) 871 (C. C. A. 2), which quotes from *The Vera Cruz*. See also *Pedersen* v. *United States*, 14 F. Supp. 1008, 1009, where it is said of the Act: "This language [for damages caused by a public vessel] and similar language has been construed to mean damage inflicted by the vessel or its appurtenances."

The court below noted (fn. 3, R. 10–11) that the physical instrumentality test is consistent with the allowance of recovery for damages caused when a public vessel creates an imminent threat of collision, crowding a second ship out of her channel into an obstruction (*The Harding Highway*, 53 F. (2d) 938 (C. C. A. 3)), or where damage results from swells negligently set up by a public vessel (*McCormack Sand & Gravel Corp.* v. *United States*, 1938 A. M. C. 1569 (E. D. N. Y.)). The court observed (R. 10) that in these cases the public vessel, while it did not come into actual physical contact with the injured object, nevertheless was the physical agent creating the injury: in the *McCormack* case the inanimate object under propulsion imparted the force of its momentum by way of an intervening physical medium; in the *Harding Highway*, the government vessel through faulty navigation crowded the private vessel into an obstruction "in an endeavor to avoid a headon

collision with possible loss of life to her passengers." The Government did not raise any jurisdictional defense in *The Harding Highway* and does not now suggest a rule which would recognize liability under the Act only when a ship in imminent peril because of the improper presence of a public vessel in its course elects to receive the direct impact of the public vessel.[7] It does submit, however, that nothing in the language or history of the Act shows a Congressional intention to depart from the established principles of liability in admiralty, operative when loss is said to be caused by a vessel.[8]

In each of the foregoing cases the proximity or physical force of a public vessel directly caused

[7] Other prior decisions under the Act cited by petitioner (Br. pp. 10–12) are not in point. *New England Maritime Co.* v. *United States*, 55 F. (2d) 674 (D. C. Mass.), affirmed sub nom. *United States* v. *Gould*, 73 F. (2d) 1016 (C. C. A. 1), involved an actual collision, and the only question considered by the Court was whether the Act allows suits for damages to persons as well as property. In *Coastwise Transportation Corp.* v. *United States*, 43 F. (2d) 401 (D. C. Me.), a dubious decision even on the merits (cf. *The Sarnia*, 261 Fed. 909 (C. C. A. 2); *The Coamo*, 267 Fed. 686 (C. C. A. 2)), a private vessel attached by a towline to a Navy tug under hire to the owners of the private vessel struck a reef. In *Porello* v. *United States*, 53 F. Supp. 569 (S. D. N. Y.), the issue was whether a stevedore injured on a public vessel could sue under the Act. The opinion does not disclose the cause of the stevedore's injury.

[8] *Standard Oil Co.* v. *United States*, 267 U. S. 76, cited by petitioner (Br. p. 7) as closely paralleling the situation *sub judice*, merely held that the loss of a seized vessel, oc-

the damage. In the instant situation, on the other hand, the moving factor was the actions of naval authorities whose directions the *Carelier* was following. These directions employed the patrol boat *YP 249* as the means of designating a course. The use of the boat instead of a lighthouse or other stationary marker was incidental in the occurrance of the damage to the petitioner's vessel. As the court below suggested (R. 15), the result would have been no different had the *Carelier* been directed in its erroneous course by radio or by a naval officer sent aboard the *Carelier* itself. Cf. *The Sarnia*, 261 Fed. 900 (C. C. A. 2).

If the *Carelier* had been told by the naval authorities to follow a privately owned vessel proceeding into Delaware Bay and had struck the wreck while so doing, surely the private vessel could not have been charged as the cause of the damage. The efficient cause was the erroneous course set for the *Carelier* by the naval authorities, not the means selected to mark that course. The patrol boat *YP 249* here functioned merely as a means for conveying to the *Carelier* the course it should take in entering Delaware Bay. We submit that the formulation and transmission of an erroneous instruction or order does

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curring during the seizure and while she remained under the control of a naval officer, resulted from a "war risk" under a policy of insurance. There is no hint in the decision that the warship there involved was the "cause" of the loss. Indeed, the warship had been last sighted 400 miles away from the location of the loss.

not constitute a tortious use of the instrument of transmission—here the patrol boat.[2]

C. Principles of Liability in Rem Do Not Support Recovery Here Under the Public Vessels Act

Petitioner contends that the Act "contemplates liability on *in rem* principles" (Pet. Br. 17), and argues that the libel is maintainable because the *YP 249* "physically, by her own movements, negligently directed the movements of the *Cavelier*" (Pet. Br. 20). Even assuming that the conclusion would follow from this premise, the premise is wholly untenable.

Petitioner points to Section 2 of the Act which provides that suits thereunder "shall be subject to and proceed in accordance with the provisions" of the Suits in Admiralty Act of 1920 "in so far as the same are not inconsistent herewith," and petitioner contends that this substantively incorporates into the Public Vessels Act Section 3 of the Suits in Admiralty Act which provides in part:

> If the libelant so elects in his libel, the suit may proceed in accordance with the

[2] The extremes to which the construction contended for by petitioner might lead may be suggested by a slight alteration in the facts of this case: for example, if the course set by the *YP 249* for the guidance of the *Cavelier* had been communicated not by the stern of the patrol boat but by markers dropped by it, which were followed by the *Cavelier* after the *YP 249* was out of sight. If the Act should be applied to such a case, it might then be argued that it applied equally to damage resulting from observance of a channel marked by buoys or other navigational aids set by public vessels.

> principles of libels *in rem* whenever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained.

Petitioner concludes, therefore, that whenever a private vessel might be liable *in rem* for the acts of her master or crew, liability *in personam* may be maintained under the Act.

It is evident, however, that the reasons for permitting suit upon *in rem* principles where a Government-owned merchant vessel is involved are inapplicable to the Public Vessels Act. Prior to 1920 merchant vessels of the United States could be attached under Section 9 of the Shipping Act of 1916 (*The Lake Monroe*, 250 U. S. 246), whereas a public vessel was never subject to attachment. *The Western Maid*, 257 U. S. 419. Hence it was reasonable for Congress, in eliminating libels *in rem* against merchant vessels to substitute a right to proceed to an *in personam* judgment against the United States on *in rem* or *in personam* principles at the libellant's election (see Section 3 of the Suits in Admiralty Act), but there was no corresponding reason why Congress should have authorized suits on *in rem* principles under the 1925 Act.

Unlike the 1920 statute, which authorizes a libel *in personam* against the United States "in cases where if such vessels were privately owned or operated, * * * a proceeding in admiralty could be maintained" (Sec. 2), the Public Vessels Act authorizes such a libel only where the damage is "caused by a public vessel." This difference in

the substantive provisions of coverage indicates that the incorporation provision of Section 2 of the Public Vessels Act is designed merely to supply a procedure for the trial of suits authorized by Section 1. This is indeed the only result permissible in view of the clause in Section 2 "in so far as the same are not inconsistent herewith." To the extent that the 1920 Act imposed liability in circumstances excluded from Section 1 of the Public Vessels Act, it would be "inconsistent therewith." Any attempt to broaden the liability imposed by Section 1 of the 1925 Act by a process properly characterized below as "obscure and circuitious" (R. 14) would render Section 3 of the Suits in Admiralty Act controlling rather than the substantive provisions of the Public Vessels Act itself.

Petitioner's intimation (Pet. Br. 18) that the Act is "coextensive" with the Suits in Admiralty Act is unsound. The use of entirely different language in Section 1 of the Public Vessels Act and Section 2 of the Suits in Admiralty Act (each delineating the scope of the Act involved) cannot be attributed to accident, since where Congress wished to adopt the same provisions for both Acts, as in the case of procedure, it did so expressly (Sec. 2 of the Public Vessels Act). To hold the coverage of the two statutes to be identical would impute to Congress a misleading use of wholly different language to express the same thought in closely related statutes. The more reasonable inference is that Congress advisedly used different

words to establish different criteria of liability in the two statutes. See Sutherland, *Statutory Construction* (3d Ed. 1943), § 5202.[10]

D. Considerations of Policy Militate Against the Broader Coverage Urged by Petitioner

To apply the Public Vessels Act to the situation *sub judice* would, particularly during war time, open so wide an avenue of liability on the basis

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[10] Petitioner cites two excerpts from the Attorney General's Letter to the House Committee Chairman, as authority that the 1925 Act was understood to be "coextensive" with the 1920 Act (Br. 18–19). Certain words omitted by petitioner from the cited excerpts (Br. 19, 22) are fundamental to an understanding of the letter. The full quotation reads "the proposed bill intends to give the same relief against the Government *for damages caused by collision by its public vessels* * * * as is now given against the United States in the operation of its merchant vessels as provided by the Suits in Admiralty Act." (Words omitted by petitioner are in italics.) As to such cases, the two Acts are, of course, coextensive. However, since the Attorney General's letter was addressed to the earlier bill and not to H. R. 9535 (petitioner's intimation to the contrary, Br. 17, is unfounded), the words of coverage now contained in the Act—"for damages caused by a public vessel"—must be substituted for the words "for damages caused by collision." When thus read, the Attorney General's letter would do no more than express the limitation contained in the Act. Similarly, the excerpt from the Attorney General's letter quoted at p. 17 of petitioner's brief must be read in context. This excerpt is taken from a paragraph where the Attorney General was discussing the question of whether the proposed act limited recovery to the value of the vessel. The complete text of the letter appears in H. Rep., pp. 11–13, and in S. Rep., pp. 11–13.

of equivocal language as to cast doubt upon the validity of attributing to Congress so sweeping an intention.

As is public knowledge, war vessels of the United States are and have been widely engaged in convoying private merchant ships on all courses where potential enemy action or defensive measures such as mine fields create hazards beyond the ordinary risks of navigation. The *Cavalier* herself, as the minority decision below observes, was in convoy at the time it incurred damage (R. 21); the waters constituting the entrance to Delaware Bay were mined (*infra*, Appendix C); and sinkings of merchant ships in the Atlantic were near their height. In these circumstances the difficulty of conveying the exact course by radio directions, the risk of enemy utilization of ordinary navigational aids such as lights, markers or buoys, and the impracticability of transferring naval officers in mid-convoy to the bridges of incoming ships quite obviously could render obligatory the use of auxiliary naval craft for the functions here performed by the *YP 249*.

The successful maintenance of this action under the Public Vessels Act would impose potential liability upon the Government for all operations of the type mentioned and for all damage caused by directions and orders issued by naval personnel aboard convoying public vessels. (Cf. Petitioner's

citation of *Standard Oil Co.* v. *United States*, (Br. 7), discussed *supra*, fn. 8). Losses so sustained—e. g., in a situation in which a convoying commander on a public vessel, perhaps to avoid the supposed location of enemy submarines, leads a convoy of merchant vessels into shoal waters—are essentially the result of increased hazards growing out of war.[21] In view of the strict construction to which a statutory waiver of sovereign immunity is entitled (*United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Blackfeather* v. *United States*, 190 U. S. 368, 376; *Schillinger* v. *United States*, 155 U. S. 163, 166), a clear Congressional expression of purpose would seem to be necessary to render the Government liable for such risks. We submit that such an intention is not to be inferred from an Act, the legislative history of which shows that it was directed to cases of collision and comparable causes of loss suggested by the cases cited.

II. THE LIBEL FAILS TO STATE A CAUSE OF ACTION INVOLVING THE NEGLIGENCE OF A PUBLIC VESSEL OF THE UNITED STATES

There remains an independent basis for the dismissal of the libel: the fact that it nowhere alleges the violation of any duty owing from the *YP 249* or those in charge of her to the *Cavelier*, upon which negligence, and therefore liability un-

[21] Cf. the description of convoy operations in *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 278 Fed. 770, affirmed 282 Fed. 976 and 263 U. S. 487.

der the Act, may be predicated.[12] The libel does not state that the directions to the *Cavelier* to follow the *YP 249* emanated from any officer or member of the crew of that vessel (see R. 1–3), and this is conceded in petitioner's brief (p. 21, fn.). Consequently, the sole basis for the alleged cause of action is that the *Cavelier* "received instructions from the United States Naval authorities" not situated on the *YP 249*, to follow the *YP 249* into Delaware Bay (R. 2; Pet. Br. p. 21, n.). But there is no allegation in the libel that any one aboard the *YP 249* undertook to guide the *Cavelier* into the Bay, or was even aware that the patrol boat was being followed by the *Cavelier* for that purpose. Petitioner's allegations that the patrol boat "led the *Cavelier* directly over a submerged wreck" and that her damages "were * * * due to the fault and negligence of the * * * *YP 249* and those in charge of her" (R. 2–3) are mere conclusions since the factual allegations in the libel do not show that the *YP 249* directed the *Cavelier* to follow it.

Since it is not charged that the *YP 249* was under any duty to the *Cavelier*, either to lead it safely into the Bay or to take any other action which it failed to take, there can be no actionable negligence or fault on the part of that vessel. This ground for dismissal of the libel warrants affirmance of the judgment independently of the reasons advanced by the court below.

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[12] This additional ground was argued in the court below (Br. of appellee in No. 6429, pp. 16–17), but was not passed on in the opinion below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1945.

APPENDIX A

The Public Vessels Act, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act

authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

SEC. 3. That in the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: *Provided*, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of this Act, the respondent in the cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given.

SEC. 4. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government having control of the vessel at the time the cause

of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena.

SEC. 5. That no suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

SEC. 6. That the Attorney General of the United States is hereby authorized to arbitrate, compromise, or settle any claim on which a libel or cross libel would lie under the provisions of this Act, and for which a libel or cross libel has actually been filed.

SEC. 7. That any final judgment rendered on any libel or cross libel herein authorized, and any settlement had and agreed to under the provisions of section 6 of this Act, shall, upon presentation of a duly authenticated copy thereof, be paid by the proper accounting officer of the United States out of any moneys in the Treasury of the United States appropriated therefor by Congress.

SEC. 8. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

SEC. 10. That the Attorney General of the United States shall report to the Congress at each session thereof all suits in which final judgment shall have been rendered and all claims which shall have been settled under this Act.

APPENDIX B

The Suits in Admiralty Act, 41 Stat. 525 (46 U. S. C. 741–752), provides in part as follows:

> SEC. 2. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such

corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney Gen-

eral or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title.

APPENDIX C

NOTICE TO MARINERS No. 3

(Published by Hydrographic Office, United States Navy, January 21, 1942)

* * * * * *

(151) UNITED STATES—*Caution regarding obstructions and mines.*—Mariners are warned that obstructions or mines exist in the entrances to the harbors on the coasts of the United States and its possessions and that they should not attempt to enter without permission or instruction from the station or patrol vessel.

* * * * * *

(163) DELAWARE BAY ENTRANCE.—*Mines.*—The entrance to Delaware Bay has been mined. All inbound vessels must obtain permission and directions to enter from the naval station vessel southward to Overfalls Lightship, or in bad weather from the Harbor Entrance Control Post.

(See Notices to Mariners 46 (2881), 47 (2950.1) and 51 (3239 of 1941).

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

No. 279.—October Term, 1944.

Canadian Aviator Limited, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 26, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This writ brings here for review a libel filed by the petitioner, a Canadian corporation and owner of the steamship Cavelier, against the respondent, the United States Government, to recover, under the provisions of the Public Vessels Act, 1925, 43 Stat. 1112,[1] damages alleged to have been suffered by the Cavelier due to the negligent operation of a public vessel of the United States. The United States District Court dismissed the libel on the grounds that it failed to state a cause of action within the Public Vessels Act, 1925, for which the United States had consented to be sued.[2] The Circuit Court of Appeals, one judge dissenting, affirmed the District Court.[3]

The jurisdiction of the United States District Court is based on Section 24 of the Judicial Code. The petition for certiorari was granted, 323 U. S. —, because the Circuit Court of Appeals decided a question of general importance relating to the construction of a federal statute. Jurisdiction of this Court rests on Section 240(a) of the Judicial Code.

On August 4, 1942, the petitioner, the owners of the steamship Cavelier, filed a libel *in personam* in admiralty in a federal district court against the United States to recover for damages to its ship, the Cavelier, alleged to have been caused by the negligent operation of the United States Naval patrol boat, YP 249, a public

[1] 43 Stat. 1112. Section 1 provides: "That a libel in personam in admiralty may be brought against the United States, . . . for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States . . . ."

[2] Canadian Aviator Ltd. v. U. S. A., 1943 A. M. C. 744 (D. C. N. J.).

[3] Canadian Aviator v. United States, 142 F. 2d 709.

vessel of the United States. The libel averred that on July 7, 1942, the Cavelier, while en route from Canada to Jamaica, was ordered by United States Naval authorities to enter Delaware Bay. Upon approaching the Bay, the Cavelier received further instructions from the naval authorities that in her transit of the waters constituting the entrance to the bay, the Cavelier was to follow directly astern of the patrol boat, YP 249, a public vessel of the United States. While following directly astern of the YP 249, as ordered, the Cavelier struck a submerged wreck and sustained serious damages. It was further alleged that the collision with the wreck was due "solely to the fault and negligence of the United States vessel YP 249 and those in charge of her."[4] The libel also stated that petitioner, a Canadian corporation, elected to have its suit proceed in accordance with principles of libels *in personam* and *in rem*; that in similar circumstances the Government of the Dominion of Canada allows nationals of the United States to sue in its courts.

The respondent, United States, appeared specially and sought to have the libel dismissed because it failed to state a cause of action for which the United States had consented to be sued. Petitioner, the libellant, opposed this action, relying on Section 1 of the Public Vessels Act, 1925, which provided that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . . ."[5] The federal district court dismissed the libel on the ground that the accident alleged in the libel was not caused by the "*negligent operation of the vessel*," that the vessel was not the "efficient cause" of the accident but that the accident arose from the "*personal and independent negligence of its officers.*" The court held that the Act authorized suit only where the public vessel was the proximate cause of the damage.

The Circuit Court of Appeals affirmed the action of the district

[4] The petitioner's libel alleged the following specific acts of negligence:
"1. She was not in charge of a competent person.
"2. She failed to keep a good look-out.
"3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.
"4. She led the *Cavelier* directly over a submerged wreck.
"5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay."

[5] See note 1, *supra.*

court on the theory that the phrase in the Act "caused by a public vessel" meant caused by those in charge of the vessel, with the vessel as the "noxious instrument," the "physical instrument," by which the physical damage was done; that in the instant case the physical cause was the submerged wreck. The Circuit Court also held that the Act did not authorize recovery on the admiralty principles of *in rem* liability.

The dismissal by the lower court of petitioner's libel raises three questions for consideration by this Court: Does the Public Vessels Act, 1925, authorize suit against the United States where the public vessel is not the physical cause, the "physical instrument" by which the damage is done; that is, is the Act confined to cases involving the collision situation? If not, does the Act, which authorizes the filing of a libel *in personam* against the United States, authorize recovery in such suit on admiralty principles of *in rem* as well as *in personam* liability? Finally, if the Act authorizes recovery on admiralty principles *in rem* and *in personam*, does petitioner's libel state a cause of action under those principles of admiralty law?

The Public Vessels Act, 1925, was the last in a series of statutes directed generally at affording private vessel owners an adequate and efficient remedy for damages arising from negligent operation of ships owned by the United States.[6] Prior to 1916 a private owner whose ship was damaged by negligent operation of a vessel owned or operated by the United States could not recover from the United States for damages suffered due to the United States' immunity from suit. On the other hand, the United States could sue private owners for damages arising from their negligence. Recognizing the inequities of this situation, Congress passed numerous private acts granting relief in a particular case where a private vessel was damaged by negligent operation of a government ship. The delays coupled with the inconvenience to Congress of handling each claim by separate bill, led Congress to provide in the Shipping Act of 1916, 39 Stat. 728, that Shipping Board vessels while employed as merchant vessels were subject to "all laws, regulations, and liabilities governing merchant ves-

[6] Benedict, Admiralty (6th Ed.) vol. 1, 437; Robinson, Admiralty, 266; Lord, Admiralty Claims Against the Government, 19 Columbia L. Rev. 467; Borchard, Government Liability in Tort, 34 Yale L. J. 1, 35-41; 39 Yale L. J. 1189.

sels" regardless of the fact that the United States owned or had an interest in them.[7]

In *The Lake Monroe*, 250 U. S. 246, this Court held that this statutory waiver of sovereign immunity from suit subjected Shipping Board merchant vessels to proceedings *in rem* in admiralty. Since the arrest and seizure of a vessel incident to an admiralty proceeding *in rem* proved embarrassing, Congress, in 1920, adopted the Suits in Admiralty Act, 41 Stat. 525,[8] which provided generally that a "libel in personam" for damages could be filed against the government in any case where if the government merchant vessel were privately owned or operated a "proceeding in admiralty" could be maintained, Section 2; but that vessels subject to suit under the Act should not be subject to seizure or arrest, Section 1. Although Section 2 of the Act limited suit to the "filing of a libel in personam," this Court interpreted the provisions of Section 3 of the Act to authorize recovery in such suit on admiralty principles of *in rem* as well as *in personam* liability.[9] *Eastern Transportation Co.* v. *United States*, 272 U. S. 675. The Act also provided that the United States should be

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[7] Section 9 provides, in part, 39 Stat. 730-31:

"Every vessel purchased, chartered, or leased from the board . . . while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

[8] 41 Stat. 525-26, Sec. 1: "That no vessel owned by the United States . . . or in the possession of the United States . . . and no cargo owned or possessed by the United States shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . . .

"SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . ."

[9] 41 Stat. 526: "That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not prevent the libelant in any proper case from seeking relief in personam in the same suit. . . ."

entitled to the benefits of all exemptions and of all limitations of liability accorded by law to owners, charterers, operators or agents of vessels. Section 6.[10]

At the time the Suits in Admiralty Act was being considered by Congress, it was proposed to extend its coverage to include "public vessels" as well as merchant vessels of the United States. Apparently fearing that such an extension of the scope of the bill would delay passage, the Suits in Admiralty Act was adopted, its provisions being confined to "merchant vessels."[11]

After the introduction of several bills[12] dealing with suits against public vessels, Congress, in 1925, adopted the Public Vessels Act, 43 Stat. 1112. It provided that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States." Section 1.[13] Venue of such suits is laid in the district court for the district "in which the vessel or cargo charged with creating the liability is found within the United States."[14] Section 2. It was also provided that suits under the Act "shall be subject to and proceed in accordance with the provisions of . . . [Suits in Admiralty Act, 1920, 41 Stat. 525] or any amendment thereof, in so far as the same are not inconsistent herewith . . . ."[15] The Act also specified that no suit may be brought by a national of a foreign government unless said foreign government, under similar circumstances allows nationals of the United States to sue in its

[10] 41 Stat. 527: "SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

[11] Hearings of the House Committee on Judiciary, S. 3076 and H. R. 7124, Nov. 13, 1919, 66th Cong., 1st Sess., at p. 7.

[12] H. R. 13591, April 13, 1920, 66th Cong., 2d Sess.; H. R. 6053, February 14, 1924, 68th Cong., 1st Sess.; H. R. 9075, May 5, 1924, 68th Cong., 1st Sess.; H. R. 9535, May 29, 1924, 68th Cong., 1st Sess.

[13] See note 1.

[14] The Act also contained a special venue provision for cases where the vessel was outside the territorial waters of the United States. 43 Stat. 1112.

[15] 43 Stat. 1112: "SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States. . . . Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest."

courts, Section 5; Sections 8 and 9 of the Act contain provisions similar to those in the Suits in Admiralty Act, providing that the statute should not be construed to recognize the existence of a lien against a public vessel and conferring on the United States all exemptions and limitations of liability accorded by law to owners of private vessels.[16]

First: Respondent contends that Section 1 of the Public Vessels Act authorizing suits against the United States "for damages caused by a public vessel" should be construed to apply only in cases where the public vessel is the "physical instrument" by which the "physical damage" is done, e. g. collision, that therefore petitioner's libel does not lie under the Act. Such a construction narrowly limits the Act's relief. We conclude that such a narrow interpretation of the Act is not justifiable. While the general history of the Act as outlined above does not establish that the statute necessarily extends to the non-collision cases in view of the rule of strict construction of statutory waiver of sovereign immunity, *United States* v. *Sherwood*, 312 U. S. 584, 586; *Eastern Transportation Co.* v. *United States*, *supra*, we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation. *See The Lake Monroe*, 250 U. S. 246; *Nashnik* v. *United States*, 267 U. S. 122, 125-26; *Eastern Transportation Co.* v. *United States*, *supra*; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231.

In 1924, H. R. 6989 was introduced in the House of Representatives, its provisions being similar[17] to those of the Public Vessels Act as adopted, with this material difference: Section 1 of that bill authorized suit against the United States "for damages caused *by collision* by a public vessel." (Italics added.)

[16] 43 Stat. 1113: "SEC. 8. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

"SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

[17] H. R. 6989, 68th Cong., 2d Sess., provided: "That a libel in personam in admiralty may be brought against the United States, . . . for damages caused by collision by a public vessel of the United States, ..."

This bill was highly similar to the Public Vessels Act, 1925, 43 Stat. 1112, as finally adopted. A material variance, other than the one mentioned above, was a provision making the consent of the Attorney General a condition precedent to suit under the bill.

On reference to the House Committee on Claims, a substitute bill, H. R. 9535, was reported to the House.[18] This bill provided for suits "for damages caused by a public vessel of the United States." This bill with the latter phrase included subsequently became the Public Vessels Act. This change in the language of the Act prior to its adoption convinces us that Congress intended to authorize suits in other than collision cases. The sponsors of the bill in both houses of Congress understood that it extended to cases where damage was done "by collision, or other fault of Government vessels and Government agents."[19] Moreover, Congressional reports on this bill and the course of discussion in the numerous hearings held on predecessor measures to the present bill, indicates that authority to sue was not to be limited to cases where the vessel was the physical instrument that caused the physical damage.[20]

The use of the phrase "caused by a public vessel" constitutes an adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship. Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court. *United States* v. *Brig Malek Adhel*, 2 How. 210, 233-34; *The China*, 7 Wall. 53, 68; *Ralli* v. *Troop*, 157 U. S.

[18] H. Rep. No. 913, May 31, 1924, 68th Cong., 1st Sess.

[19] 66 Cong. Rec. 2087. Representative Underhill, the sponsor of the bill, stated:

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."

Similarly, Senator Bayard, in discussing the measure in the Senate, said, 66 Cong. Rec. 3560:

"It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accidents of any kind resulting from collision, and so on, are taken care of. A great deal of money would be saved to the Government."

[20] H. Rep. No. 913, 68th Cong., 1st Sess., at p. 62; S. Rep. No. 941, 68th Cong., 2d Sess., at p. 3; see also H. Rep. No. 1301, 66th Cong., 3rd Sess., Feb. 7, 1921, see especially letter of the Acting Secretary of the Navy, p. 8; Hearings before Committee on Judiciary of the House of Representatives, on H. R. 9075, 68th Cong., 1st Sess., May 21, 1924, pp. 6, 19, 21, 23, 28, 30.

386, 402-3; *The John G. Stevens*, 170 U. S. 113, 120; *The Barnstable*, 181 U. S. 464, 467. That such was the meaning attributed to this phrase is further evidenced by Section 2 of the Act, relating to venue, which provides that venue shall lie in the district "in which the vessel or cargo charged with creating the liability is found." 43 Stat. 1112. The consent to suit embodied in the Act thus extends to cases where the negligence of the personnel of a public vessel in the operation of the vessel causes damage to other ships, their cargoes, and personnel, regardless of physical contact between the two ships,[21] and where principles of admiralty law impose liability on private parties. There seems no logical reason for allowing recovery for collision and refusing recovery for damages caused by other movements of the offending vessel.

The fact that the Committee reports on the bill state that the "chief purpose" of the Act is to authorize recovery in collision cases, that the departmental letters attached to the report consider principally the "collision" situation, does not require that the statute should be so limited.[22] Respondent relies on *The Osceola*, 189 U. S. 158, in which it was held that a Wisconsin statute imposing liability "for all damages . . . done to persons or property by such ship" did not apply to injuries suffered by a member of a ship's crew arising from the negligence of the master of the vessel, since the damage was not "done by the ship herself, as the offending thing, ..." 189 U. S. 158, 176. Since that case involved a suit by a member of the crew against his employer-owner of the vessel, the holding in that decision on its facts is clearly inapplicable to the instant case. Moreover, the language in the Wisconsin statute is narrower in scope than that in the Public Vessels Act, 1925, which refers generally to "damages caused by a public vessel." Furthermore, the legislative history of the Public Vessels Act requires a different result in so far as the *Osceola* case interprets the Wisconsin statute to apply only to cases where the vessel is itself the physical cause of the damage. These latter two considerations serve also to distinguish *The Vera Cruz, No. 2*, 9 L. R., Prob. Div. 96 [1884]. Respondent also re-

[21] See Coastwise Transportation Corp. v. United States, 43 F. 2d 461; The Harding Highway, 53 F. 2d 938.

[22] H. Rep. 215, 68th Cong., 1st Sess., pp. 1, 6; S. Rep. No. 941, 68th Cong., 2d Sess., pp. 1, 6.

lies on *Dobson* v. *United States*, 27 F. 2d 807, and *O'Neal* v. *United States*, 11 F. 2d 869. These cases are not apposite on the question under consideration since they also involved suits for damages, for personal injuries sustained by a seaman employee aboard his own ship, against the United States as employer.

Second: Petitioner, evidently relying on Section 2 of the Act, states in its libel that it elects to have the action proceed on principles of *in rem* as well as *in personam* liability.[23] As the Circuit Court of Appeals apparently holds that the Act does not authorize recovery on principles of *in rem* liability because of the statutory denial of a maritime lien, we turn to a consideration of this holding. Does the Public Vessels Act which authorizes filing of a "libel in personam" authorize the courts to apply principles of *in rem* as well as *in personam* liability in admiralty?[24] As was indicated, p. 4 *supra*, this Court held that the Suits in Admiralty Act, which also authorizes filing of a "libel in personam" authorizes the courts to grant judgment on *in rem* as well as *in personam* principles, except that the government vessel was not subject to seizure or arrest. Section 3 of that Act, "Procedure in cases of libel in personam,"[25] specifically authorizes a libelant, if he so elects, to proceed in accordance with principles of libels *in rem* if it appears that had the vessel been privately owned a libel *in rem* might be maintained; election to so proceed is not to preclude the libelant from seeking relief *in personam* in the same suit. Although the Public Vessels Act does not have a similar provision, Section 2 of the Public Vessels Act expressly provides that "suits shall be subject to and proceed in accordance with the provisions" of the Suits in Admiralty Act, "in so far as the

[23] See Admiralty Rules, Supreme Court, Rule 14:

"In all suits for pilotage or damage by collision, the libellant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner."

[24] See note 1, *supra*. At the time of the Committee reports on H. R. 9535 (which when adopted became the Public Vessels Act), the courts had not yet interpreted the Suits in Admiralty Act, 41 Stat. 525, to authorize recovery on admiralty principles of both *in rem* and *in personam* liability. See Eastern Transportation Co. v. United States, 272 U. S. 675 (1927). We find no discussion of whether Section 2 of the Public Vessels Act imported both principles into its text. The problem had been adverted to in the Attorney General's letters of opinion to the committees considering the problem. H. Rep. No. 913, p. 12, 68th Cong., 1st Sess.; S. Rep. No. 941, p. 12, 68th Cong., 2d Sess.; Hearings before the Committee on Judiciary of the House of Representatives on H. R. 9075, May 21, 1924, pp. 30, 31 and 34.

[25] 46 U. S. C. § 743; see note 9, *supra*.

same are not inconsistent" with the provisions of the Public Vessels Act.[26] Since there is nothing in the Public Vessels Act that is inconsistent with this provision of the Suits in Admiralty Act, we hold that the incorporation clause applies. Other provisions of the Public Vessels Act support such incorporation. Authority is given to sue generally "in admiralty"; this broad generic term implies a right to invoke principles of *in rem* and *in personam* liability. Furthermore, in *Eastern Transportation Co.* v. *United States*, *supra*, we held that authority to resort to both types of principles of admiralty liability was borne out by the fact that the Suits in Admiralty Act provided that the United States should be entitled to all the exemptions accorded to private persons under admiralty law. We there held:

> The necessary implication is that if, under the Harter Act . . . or the Limitation of Liability Act, . . . the United States as owner of a merchant vessel should not be able to show performance of the conditions upon which such statutory limitations of liability are granted, it must assume the personal liability for negligence in such cases exactly as a private owner would." (272 U. S. 675, 690-91.)

The Public Vessels Act contains the same exemption provision as that in the Suits in Admiralty Act.[27] This interpretation of the Act accords with the broad purpose expressed in the Congressional hearings and reports on the Act.[28] In addition, such an interpretation accomplishes Congress' purpose to grant foreign nationals the same rights as would be accorded our nationals in foreign courts in a similar situation. A narrower interpretation would limit the reciprocal effect of this Act.[29]

Third: Since we hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner, it remains to be considered whether petitioner states a valid cause of action under general principles of admiralty law, *in rem* and *in personam*. Petitioner alleges that the respondent's vessel, having undertaken to guide petitioner's boat, the Cavelier, through the waters at the entrance of the bay, did so in a negligent fashion causing petitioner to strike a sub-

[26] See note 15, *supra*.
[27] See note 16, *supra*.
[28] See note 20, *supra*.
[29] See note 16, *supra*.

merged wreck, that the accident was caused solely by the negligence of YP 249 and its crew. It needs no extended citation of authority to show that where a tug negligently grounds its tow, the tug and its owner are liable for the damages resulting therefrom. *The Quickstep*, 9 Wall. 665; *The John G. Stevens*, 170 U. S. 113; *The Temple Emery*, 122 Fed. 180; *The W. G. Mason*, 142 Fed. 913; *see, The Caspian*, 14 F. 2d 1013; *The Murrell*, 200 Fed. 826; *The Sally McDevitt* v. *The J. W. Paxon*, 24 Fed. 362; *The Rescue*, 74 Fed. 847.[30] The fact that the Cavelier was not fastened to the YP 249 by a tow rope is irrelevant.[31] The libel avers that she was under orders by the naval authorities to proceed directly astern of the YP 249; for all practical purposes she was as firmly fastened to the stern of the YP 249 as if she had been in tow.

The judgment of the ~~district~~ court ~~dismissing the petitioner's libel~~ is reversed, with direction to proceed with consideration of the case on the merits.

circuit

and the cause remanded to the district court.

[30] Benedict, Admiralty (6th Ed.), vol. 1, pp. 363-5, 367-69.

[31] It is clear that tort liability in admiralty does not require physical contact between the offending vessel and its victim. See Leathers v. Blessing, 105 U. S. 626, 630. "Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case." See also Eastern Transportation Co. v. United States, 272 U. S. 675; In re Fassett, 142 U. S. 479, 485; Phila. W. & B. R. Co. v. Phila. & H. Towboat Co., 23 How. 209, 215-16; The Lyndhurst, 92 Fed. 681; The Kronprinzessin Cecilie, 192 Fed. 27; The Campania, 203 Fed. 855; The Washington Irving, 250 Fed. 797; The Luke, 19 F. 2d 923, aff'd, 19 F. 2d 925; Coastwise Transportation Corp. v. United States, 43 F. 2d 401; The J. C. Hart, 43 F. 2d 566; The Favorita, 43 F. 2d 569.